El Defensor

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Departmento de Defensores de Oficio de Kentucky

Tomo 23, Núm. 3 Mayo de 2001

INTERPRETACIÓN JUSTA PARA LOS IMPUTADOS SORDOS O NO-ANGLOHABLANTES EN LAS ACCIONES

"Dadme vuestros seres cansados y pobres, Vuestras masas que anhelan respirar en libertad, Dadme los desamparados que huyan de la miseria, de costas populosas, Dadme los desheredados, los que las tempestades batan, ¡En alto levanto mi antorcha junto al portal de oro!"

Crítica de la legislación de Derecho Penal de la Asamblea del 2001

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The Advocate:
Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

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FROM THE EDITOR...

Ed Monahan

Our cover is in Spanish to emphasize the difficulty of understanding another's language. Lack of effective communication plays a major part in most every problem in life. Our criminal justice process faces many communication problems amongst those who speak the same language. Communication problems increase when people do not speak the same language. The communication problems for our criminal justice system are growing because of more non-English speaking and deaf defendants and witnesses. In this issue we present helpful articles on interpreting accurately in the criminal justice system from the perspectives of interpreters, a judge, a defense attorney and a paralegal.

Thanks to Margaret Redd, a United States Court Certified Interpreter, for translating our cover into Spanish. In English, our cover reads:

Accurate Interpretation for Non-English Speaking and Deaf Defendants in Criminal Proceedings

Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!"

Review of the Criminal Law Legislation of the 2001 Legislature

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The 2001 General Assembly's criminal legislative action is reviewed in this issue with the 2002 session fast approaching.

Apprendi is a major case. Margaret Case's article explores its application in Kentucky.

Boykin is a case of long ago but Scott West's articles helps us understand its importance today.

Many on death row are mentally ill, as national studies confirm. Kentucky is no different than the nation in this regard.

The 2001 Annual Defender Conference will be held in Lexington, Ky., June 11-13, 2001. Our theme is Actual Innocence and Race.

Edward C. Monahan
Editor

THROUGH THE EYES OF AN INTERPRETER

by Isabel Framer

Mr. Santos Adonay Pagoada, a Honduran citizen who had been working in Kentucky for some months, was illiterate in Spanish and did not speak English. On July 17,1997 he was arrested and charged with the murder of Jose Enrique Arambul.

Mr. Pagoada went to trial on February 17, 1998 and was found guilty of murder. On March 13,1998, Mr. Pagoada was sentenced to 40 years, as per the jury recommendation. On direct appeal, only one issue was raised: failure of the trial court to grant the defendant's motions for directed verdict. On December 17, 1998 the Kentucky Supreme Court affirmed the conviction.

Mr. Pagoada filed a RCr 11.42 motion on December 27, 1999 alleging ineffective assistance to counsel (IAC). A supplemental RCr 11.42 motion was filed on May 12, 2000. Several of the IAC claims centered around the interpretation provided (or lack thereof) to Mr. Pagoada both before and during his trial. The trial court ordered an evidentiary hearing on the motions. The hearing was held on September 7, 2000, and was completed on October 20, 2000.

As an interpreter who had been involved in issues of standards, training and certification testing in Ohio, I was asked by the appellate attorney in this case to review the record and give an expert opinion about the interpretation rendered up until and including the trial. In preparation for this assignment, I viewed the videotapes of Mr. Pagoada's arraignment, suppression hearing and trial. What follows is a summary of the circumstances, followed by my analysis.

IN-COURT PROCEEDINGS

During the arraignment, the interpreter hired by the court sat next to Mr. Pagoada and did not interpret until the Judge gave the next hearing date and directed the interpreter to inform the defendant accordingly.

During the suppression hearing, the same court-appointed interpreter again sat next to the defendant and throughout the entire hearing, which lasted approximately an hour, spoke only sporadically. Sometimes the interpreter sat with his back to the defendant, hand on his chin, listening to the testimony.

When the trial judge, who noticed that the interpreter was not interpreting, brought this fact to the parties' attention, the interpreter informed the court that he, the interpreter, had asked the defendant if he understood and the defendant had said that he did. This verbal exchange between the interpreter and the trial judge was not interpreted to the defendant, nor did the judge ask the defendant whether such a conversation with the interpreter had taken place.

The trial judge informed counsel of her concerns with this interpreter's ability to interpret the trial. The defense attorney recommended another interpreter, whom he had used to interpret jail interviews. The trial judge accepted that interpreter for the trial, but stated that she wanted the interpreter's qualifications to be placed on the record.

TRIAL

At trial, the interpreter was never asked to state her qualifications or experience and was never administered an oath of accuracy.

On the videotape of the trial proceedings, the interpreter can be observed saying a few words every now and then. At a later hearing, the interpreter testified that she had been provided with the medical report but due to her school schedule was unable to review the material. She also stated that she pointed to pictures because she did not know certain medical terminology.

During a crucial part of the trial, the judge held a side bar with the attorneys, Mr. Pagoada, and the interpreter to be certain that Mr. Pagoada understood his right to testify or not to testify. At times the interpretation was nonsensical, composed of words that sound like Spanish but which are not part of the Spanish lexicon, such as "carecto," "satusfichado," "factos," and "consecuencas." Instead of the word "vida" which means "life" in Spanish, she used the word "libra" which means "scale" in Spanish. The effect was that of listening to Sid Caesar imitate a person speaking a foreign language. The interpreter also carried on independent conversations with the defendant and did not interpret these conversations back to counsel or the judge. A small excerpt illustrates the tenor of these exchanges:

Judge: And based on their decision, if he is convicted if they find him guilty of any level on which I instruct.

Interpreter [to Mr. Pagoada, in Spanish]: In their decision, in any part of the court if it's high low it's theirs, they will make the decision.

Judge: As to whether he committed the murder.

Interpreter: [in Spanish] If you committed the assassinated.

Judge: Here is what he needs to know. If he is, if he believes that he can convince a jury that he was defending himself, he needs to make that decision as to where enough has been said, or if he needs to say more.

Interpreter: [in Spanish] She says that the [*judados*] are going to make that decision. If you think that they have heard a lot of evidence to defend you, that you were defending your life, then that's fine, but if not, then you should give them an explanation why you think you, you were defending your life. Do you think that they did hear lots of evidence to say, oh yes, this guy was defending his life?

Judge: All right then, I think that whether he accepts it or not, it has been explained to him as adequately as it possibly can be.

ANALYSIS

It was clear from a review of the material that the interpreters used for the interrogation and the in-court proceedings were unable to render the communication accurately. And quite apart from their language ability, all the interpreters observed were unaware of court protocol as well as the interpreter's ethical obligations.

1. An interpreter should not take it upon himself to ask independent questions, omit information or add spin to questions, or engage in private conversation with a defendant. An inexperienced interpreter may, thinking she is "helping, " solicit information not otherwise solicited or stop information that might be crucial, substituting her own opinion for that of the interrogating officers. Nor should an interpreter ever be permitted to interview a defendant without an attorney being present. *The interpreter cannot give legal advice*.

2. In court, an interpreter's role is to interpret everything stated by the parties without altering, omitting, editing, or summarizing anything. If an interpreter does not interpret all of the witness testimony in a trial, a defendant cannot participate in his own defense. The interpreter is to interpret accurately what all parties have stated, and not to give brief narrations or summaries. A full rendition of in-court proceedings can only be done if the interpreter interprets simultaneously. Inexperienced interpreters can only render a few words at a time. It is immediately obvious if an interpreter is only speaking sporadically, with long periods of silence, that no simultaneous interpreting is being delivered. Untrained people will resort to summaries or long periods of silence because they do not have the skill— which must be honed through much practice— to listen and speak and process units of meaning in two languages at the same time. This skill cannot be developed overnight or in the course of a trial. It requires much training and practice, as well as understanding of legal terminology and procedure.

3. The judge should have inquired as to the interpreter's background and experience before the trial began. An oath of accuracy should have been administered. Although the trial judge was sensitive to the issue, she believed that anyone claiming to be bilingual was qualified to interpret in court proceedings. Lay persons commonly believe that anyone who is "good with language" or who "speaks another language perfectly" will be able to interpret accurately in legal settings. Nothing could be further from the truth.

4. A defendant's ability in conversational English is not sufficient to be able to participate meaningfully in legal proceedings. At any rate, the interpreter should not take it on himself to elicit or assess a defendant's ability to understand English. The interpreter's role is to *interpret* unless directed otherwise by the court. If the defendant tells the interpreter not to interpret, the interpreter must immediately make this known to the court.

5. The standard procedures and rules applicable to all defendants in a criminal case should be equally applied to a non-English speaking person. The fact that an interpreter is present is no reason to deviate from those procedures. The interpreter is a vehicle to enable communication to take place between defendant, litigant, or victim with the court and all parties. An interpreter may not step outside his role by encouraging or limiting a defendant's answers.

6. There is a professional code of ethics and practice for court interpreters that is essentially the same for state and federal courts in the United States. There are accepted norms of testing in the field, which vary from state to state, but it is generally agreed that the only way to judge interpreters' competence is through accuracy testing of typical court proceedings. Professional interpreters can offer clear answers when queried as to their knowledge and experience. They belong to associations which assist them in improving their skills and language proficiency through continuing education. They abide by their professional code of ethics and responsibilities. A professionally trained interpreter will uphold the integrity of the profession and the courts. They will accurately represent their credentials and always remain neutral parties, regardless of who has hired them.

SUMMARY

There is no substitute for a professional interpreter, and all parties should beware of imitations. An interpreter should be queried on the record as to court experience and qualifications.

Throughout the years of my experience as a court interpreter, I have heard and personally observed numerous cases where

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untrained, unqualified interpreters have been provided to the court. I have seen untrained interpreters act as advocates for one or the other party. I have seen interpreters disclose privileged information to the adversary. I have seen interpreters give legal advice, summarize, or explain on their own, legal concepts. I have seen interpreters who, instead of interpreting, have advised defendants or victims on what to do. I have seen the use of wrong terminology and misinterpretation, leading to wrong impressions by law enforcement, attorneys, judges, juries and defendants. I have seen cases ranging from minor misdemeanors to felonies where friends, advocates from churches, or family members have been used to provide interpretation for law enforcement, prosecutors, defense attorneys and even for the courts. In most of these cases, the persons providing interpretation meant well but end up causing great harm.

I have seen cases reversed due to poor interpretation, and cases dismissed because an interpreter was not used for a consent to search. I have seen cases where evidence was suppressed because *Miranda* was improperly interpreted. I have seen possible rape charges erroneously charged as domestic violence and then later amended to a lesser charge; instead of a qualified interpreter an officer (that claimed to be versed in the Spanish language) was providing the interpretation and did not understand when the victim said that she was being forced to have sex. I have seen family members charged with obstruction of justice because law enforcement used a family member to interpret and then later found out it was misinterpreted.

CODA

Mr. Pagoada's case is still pending. Since the time I gave testimony in this matter, Kentucky joined the National Center for State Courts' Consortium for State Court Interpreter Certification. Twenty-four states are now members of the consortium, which tests interpreters in Spanish and several other languages.

The many problems addressed above are important not only because of the obvious denial of constitutional rights, but to permit such atrocities to occur only calls into question general fairness and due process concerns of us all.

References, suggested reading, and web pages:

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Theory, Policy And Practice
By, Roseann Duenas Gonzales
Victoria F. Vasquez
Holly Mikkelson
Carolina Academic Press (919) 489-7486
O-89089-414-0

Court Interpretation:
Model Guides for Policy and Practice in State Courts
ISBN: 0-89656-146-1
Publication Number: R-167
National Center for State Courts
(757) 253-2000

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Achieving Professionalism in Court Interpreting

Susan Berk-Seligson
The Bilingual Courtroom
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ISBN 0-226-04373-8

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Alicia B. Edwards
The Practice of Court Interpreting
Volume 6 ISBN 1-55619-684-0

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COURT INTERPRETERS: A LETTER TO A CONGRESSMAN

by Margaret G. Redd

Kentucky has experienced a massive influx in the past three to five years of non-English speaking immigrants, legal and otherwise, Spanish and sometimes indigenous-language speakers. In our state courts, there is an urgent need to educate all of the participants and personnel involved in court-interpreted cases as to the role, function, duties, and responsibilities of interpreters. There is a similar critical need to endeavor to find trained and qualified interpreters or train those who are currently being paid out of state funds to provide interpreter services to the courts. Despite the very capable, excellent professionals who work in our court system, the language issue apparently confounds people who otherwise think perfectly clearly about the functioning of the judicial setting.

Please allow me to give an example from another professional setting, that of medicine, where comparable problems complicate the rendering of health services to patients who do not speak English sufficiently well to be attended to. It has been the practice locally, in some situations, although not all, for health providers to a) use family members, including small children, to assist in the communication of medical care to their parents or relatives, and b) to seek out staff members of limited language skills in order to communicate with the patient. In the former circumstance, the health care providers are inadvertently violating the patient's confidentiality regarding medical treatment, and in the latter, may very well be infringing upon the patient's civil rights insofar as the patient has the right to give informed consent as to treatment, to understand what treatment is being administered, what are the alternatives and consequences to treatment, post-clinic or hospitalization follow-up procedures, and soon. My point, which hopefully is clear, is that absent the "language barrier;" no health care professional would dream of involving a patient's child or administering care without informed consent, in keeping with the practitioner's professional standards, as well as to avoid potential costly litigation against the provider as well as the medical facility.

In a similar fashion, when for communication purposes it becomes necessary to introduce an interpreter into the judicial setting, comparable potential legal ramifications hold. An interpreter whose language skills are not sufficiently developed so as to meet the stringent requirements of judicial interpreting can adversely affect otherwise viable guilty verdicts, resulting in lengthy and costly appeals and reversals. The net cost to the state, and to the court system, over the long term is far greater than that which would be, and should be, expended at present in order to bring more professionalism into the current situation here in Kentucky. On the other hand, with regard to a defendant at the receiving end of poor or inadequate interpretation, I would hope that it is also clear that his constitutional rights to a fair trial or hearing are seriously undermined. Suppose, also, that we have an interpreter with adequate language skills but no formal training, or one ignorant of formal procedures. If at a guilty plea, the interpreter does not use the same grammatical person as the speaker, *i.e.*, in response to the Court's question, "How do you plead?', the interpreter replies, "He say she is guilty," a guilty plea made under such circumstances can be invalidated under appeal, and in fact has been so invalidated elsewhere, as the interpreter is erroneously giving a conclusion as to what the defendant means to communicate. The interpreter's proper role is to repeat exactly, verbatim, what the defendant says.

In many courts throughout Kentucky, a local individual who professes or is believed to be bilingual is often sought to perform this service. Our courts should understand that not every bilingual individual can move seamlessly between the first language and the second, and certainly not everyone who can in fact move seamlessly between the two is capable of competent interpretation. Court interpretation demands by far, more exacting standards of rendering the interpreted communication than those required of interpreters in any other setting, including that of the United Nations. In a published article, Patricia Michelsen of Virginia has noted that, "Most people do not realize that an interpreter uses at least 22 cognitive skills when interpreting." The interpreter must listen to the original message, by segments or "chunks" of meaning, lagging behind the speaker (known as 'decalage'), understand and process the message, formulate a rendition in the target language, monitor her rendition for accuracy, grammatical correctness, register and other factors, utter aloud the monitored rendition, correct any variances which the monitoring process detects, listen to the next meaning segment which must then be interpreted, while concentrating on the speaker and tuning out the sound of her own voice. These processes often require mental decisions which must be made in a split second. Environmental factors of the courtroom itself which contribute to the stress experienced by the court interpreter and hinder her performance include the following: the speaker or question exchange conducted at a fast rate of speed, speakers interrupting one another or speaking at the same time, lack of clarity, logic, or coherence of the speaker, the interpreter's lack of familiarity or experience with the subject matter, especially technical vocabulary, the speaker's accent and enunciation patterns, the speaker's level of education and use of non-standard communication patterns or vocabulary, long utterances by the speaker without pausing, background noise, not to mention that the interpreter must

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often sit at the back of a speaker or at a distance from the witness stand so as not to interfere with the jury's ability to hear the witness. Another scholar of interpretation issues points out that," ordinary listening entails too much loss, and [. . .] interpreters have to listen to speakers with much more concentration than is usual in everyday life." Michelsen also observes that, "judiciary interpreters have the additional pressure of knowing that nothing less than the life and liberty of human beings are at stake in the proceedings they are called upon to duplicate in a defendant's native tongue. The awareness that each word mistranslated or omitted hinders the non-English speaker's ability to follow the proceedings against them is a constant source of tension." The fact that only four per cent of examinees of the federal Spanish court interpreter certification exam pass that exam (which, by the way, has a cutoff rate for passing set at only seventy five or eighty percent) is testament to the difficulty of the task the court interpreter faces. Pulling a "bilingual" person off the street or out of a university classroom or ethnic restaurant is, at best, sheer ignorance, and is certainly no more logical than using beauty pageant judges to preside over judicial hearings.

I think it is also very important to emphasize that the interpreter hired by the court system must at all moments adopt a neutral, impartial posture. Her services are engaged not to assist the defense or the prosecution, but rather to serve all the parties in the courtroom in communication with a non-English-speaking witness or defendant. Adversarial counsel and the Court should be encouraged to accept this principle as fundamental to the role and ethical responsibilities of the professional interpreter. The absolute last thing I want is to have any impact on the outcome of a trial or hearing in serving the application of justice.

What I would venture to suggest at this juncture is attention to the following problems, by identifying extant problems, providing you with concrete examples of these problems, and suggesting possible solutions. First, we need to advocate for the use of certified, trained interpreters in Kentucky courts. Use of non-trained, non-proven, or unqualified interpreters is a growing problem in Kentucky, one that cannot and should not be ignored, and some changes should be made urgently, on the ounce of prevention principle. Kentucky has recently joined the National Consortium for State Courts, which has developed a certification examination for court interpreters. In the interim period before practicing interpreters can take this examination and thereby show some evidence that they have the skills necessary to interpret in court, we should advocate mandatory training in standards and norms, and above all, ethical conduct. Since the state issues payment for services provided, it can determine not to pay individuals who do not participate in such training, and the state can likewise exact monetary charges to any interpreters who attend such training, if the state undertakes to organize such training. If it does not, the state can nominally support the organization of workshops on procedure, skills and ethics by publicizing such workshops, which may be conducted by experienced interpreters brought into Kentucky from elsewhere, and obligating the costs of such workshops to be borne by those who aspire to earn fees by rendering interpreting services to the courts. I have been told of an interpreter in a state court east of Lexington who tells individuals "they had better plead guilty." Educating such an interpreter as to the limits of his role will not guarantee compliance with the precept that the interpreter is not to give legal advice, but if he does not know he is doing wrong, he certainly cannot correct his improper behavior.

Concomitantly, we need to educate prosecutors, defense attorneys, and judges as to the standards interpreters must abide by, and encourage these individuals to do everything in their power to facilitate interpreters' accuracy at their demanding task. Providing the interpreter with pertinent (and non-privileged) documentation in advance of non-routine hearings such as suppression or evidentiary hearings and trials lessens the intense demand placed on the interpreter to be accurate, that is, the demand on the interpreter is lessened, not the accuracy requirement. Recently I was engaged to provide interpretation at a trial, and came to the courtroom knowing only that the individuals on trial
were charged with assault, and were a father and son. Fifteen minutes before jury selection began I was handed seven pages of documentation which I hastened to read, which included five pages of a medical report regarding the assault victim (he had reconstructive plastic surgery to repair damage to the orbital eye area and other facial injuries), along with a police report detailing time and other circumstances of the arrest. Had I had access to such documents a day or more before the trial, I could have prepared a list of any unfamiliar vocabulary along with a "cheat sheet" of pertinent addresses, names of witnesses, places involved, instruments utilized, etc., for my own personal use and to be referred to while testimony is being given. Similarly, when an attorney argues case law, I can jot down in advance prior cases and criminal code citations, and refer to these while the speaker makes his arguments. Such advance preparation reduces the possibility that the interpreter will have to intrude upon the proceedings to ask the speaker to repeat or clarify something, and permits the examining attorney to go about his or her business without an interruption to his or her train of thought or line of questioning. Examining attorneys, furthermore, should be aware that complex questions which must be interpreted to a non-English-speaking witness
should be broken down into segments, since the non-English speaker frequently becomes confused by such questions. Individuals of low levels of literacy in their native language often tend not to follow linear patterns of thought, both in utterances directed to them, as well as in their own responses. In the case of Spanish, a verb does not require an enunciated pronoun, and third person verb forms can

refer to the subjects "he," "she," or the formal "you" in the singular, or "they" or formal "you" in the plural. An attorney cognizant of this potential for confusion can modify such questions appropriately. Cultural differences likewise affect a non-English-speaking courtroom participant's ability to grasp what is going on. Neither plea bargains or jury trials are routine occurrences in judicial systems in other parts of the world. Consequently, we should advocate for informative workshops which educate attorneys and judges as to special considerations which ought to be kept in mind regarding interpreted proceedings.

We should also advocate that the interpreter have prior linguistic contact with any witness who is to testify at a hearing. Individuals speak with regional and personal variations, and those who live in a world where the prevailing language is not one that they speak may invent words, may use verb forms which fell out of use in standard Spanish in the seventeenth century, or other completely unexpected utterances. It is hard for the educated American, as all judges and attorneys are, to understand this, although most of us have heard it said that in rural pockets of Appalachia speakers still conserve linguistic usages that are traceable back to Elizabethan times. Television and radio along with mandatory schooling up to a certain age have tended to standardize American English usage, but in rural areas of Guatemala or Mexico, standardization of language use may simply not be the fact. Furthermore, the Hispanic caught up in the American judicial system may speak an indigenous language as his native tongue, and only enjoy superficial knowledge and understanding of the interpreter's spoken Spanish. If the adversarial attorneys understood that the interpreter is merely concerned with getting the task done accurately, they would realize that the better the interpreter understands the context of the message to be interpreted, the better the interpretation, and the better the outcome for all involved.

Finally, we should advocate for the use of certified and trained interpreters for communication between witnesses and arrestees and the police or prosecutors, as the circumstances may be. The Lexington Metro Division of Police has taken commendable steps in seeking Spanish language training for their officers, but these officers should not be employed as interpreters during official interrogations, especially in light of the fact that they do not swear an oath to interpret accurately, truly, faithfully, and without bias-and probably are not trained to interpret according to these
standards. (If they must interpret at such official interrogations, they should be provided with a proper, legal equivalent of the *Miranda* warnings translated into the detainee's language, so as not to taint or jeopardize any information gained from subsequent questioning.) It is similarly problematic for the prosecutor's office to use family members or friends of the witness or victim as an official interpreter. Such individuals are apt to leave out information due to lack of skill, or possibly omit information which they fear might be prejudicial to their friend or relative. I would reiterate here that the use of a professional, trained, qualified interpreter, who knows his or her duties and ethical constraints, promotes the best outcome of the judicial proceeding and diminishes the probability of reversals or loss of confessions or other significant portions of evidence due to technicalities. All such errors are costly in terms of financial and human resources.

Finally, I would advocate two suggestions regarding specific provisions which should be implemented regarding the individual interpreter's right or authorization to continue providing Kentucky courts with interpreter services. One, that guidelines require continuing education in order to maintain one's certification once it is obtained. California has such a requirement as part of its state certification system, and while pesky and bothersome to the individual interpreter, such a requirement tends to promote high standards and uniformity of services provided, which is beneficial to the profession as a whole. Second, there should be a review procedure to deal with alleged interpreter misconduct or malpractice, and for any individual who fails to desist from such improper conduct, a terminal procedure which would strip him or her of eligibility to continue providing such services to the courts.

I might make a secondary suggestion that illegal aliens should be advised by the court of the immigration consequences attending upon a guilty plea prior to entering such a plea on the record.

Attorneys and judges are perhaps in a better position than I to evaluate the merits of the arguments I have presented here. I assure you, however, that I make these arguments in light of my personal professional experience, and out of a passionate desire to see the professional court interpreter's position advance to higher expectations and standards than those presently existing in our state. ■

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Lost in the Translation: Due Process for Non-English Speaking Defendants from an Appellate Perspective

by Donna Carr

In a criminal proceeding, rights are conveyed by words. Words have meaning. If the words have no meaning to a defendant, then such a defendant has no rights. A trial without rights is a proceeding without due process of law and fundamental fairness. It is a sham.

The problem of non-English speaking defendants in criminal proceedings who go without any or inadequate translation will not resolve itself. Courts, prosecutors, and the defense bar all bear a burden to become literate on the issue of adequate interpretation for non-English speaking defendants in criminal proceedings. Otherwise our halls of justice will devolve into a Kafkaesque nightmare of misunderstood charges, dishonored rights, and unfair convictions. The majesty of the law requires something better.

Before summarily dismissing my reflections as appellate rhetoric or "ivory tower" musing, let me say I am not unmindful or unknowledgeable of the plight of the trial court itself in addressing the needs of the non-English speaking defendant.

Having been in the trial court trenches myself for a few years, I remember well a courtroom full of people, prosecutors and defense attorneys lined up end to end, prisoners in holding cells waiting to be brought before the bench, and video arraignments to be called from the county jail. Amidst the chaos, you have your routine down pat. Each prosecutor, defense attorney, and defendant moves in just the right cadence when all of a sudden the whole march is halted by a voice over the video monitor from the county jail. "No hablo inglés," the defendant says. You try to proceed with your litany to no avail. The defendant isn't comprehending any of your words. Finally your high school or college Spanish courses pay off and you remember one word, mañana (tomorrow). At a loss of how to proceed, further arrangements are made for a court appointed interpreter to be in court with the defendant the next day.

In my jurisdiction of the Ninth District Court of Appeals in Ohio we are fortunate. Qualified interpreters are available at least in the more commonly spoken foreign languages, such as Spanish.

But what happens if interpreters are not qualified, not certified, or not available and who pays for this, both figuratively and practically speaking?

One particular trial I had as a trial judge had to be continued two times due to our inability to locate and obtain a qualified (let alone certified) court interpreter in the defendant's foreign language and dialect. Until a qualified interpreter was found, we had to rely on the defendant's family members to interpret for defendant at pre-trial proceedings. Obviously, this is not the recommended procedure as there is no guarantee of trustworthiness or competency of the interpretation, not to mention the issue of bias or conflict of interest. But courts often in these situations face these challenges, particularly in pre-trial settings.

However, fealty to constitutional and evidentiary rules cannot and must not be encroached upon by notions of cost and convenience, and must be enforced and facilitated without regard to a cost-benefit analysis. In Ohio, the controlling law of the Sixth Circuit Court of Appeals requires that special care is required in explaining rights to a non-English speaking defendant who "apparently had no knowledge of the American criminal justice system." *United Sates v. Short*, 790 F.2d 464, 469 (6th Cir. 1986). That is, translators for non-English speaking defendants must convey rights with a precision sufficient to apprise an accused of their rights. *See Duckworth v. Eagan*, 492 U.S. 195, 202 (1989). When translating witness testimony, an interpreter should give a literal translation of the witness' words. *State v. Rodriguez*, 169 N.E.2d 444 (1959). *See*, also, *State v. Pina*, 361 N.E.2d 262 (1975).

Insuring that non-English speaking defendants receive adequate interpretation assures satisfaction of the due process clause. Honoring this constitutional imperative serves three primary purposes: (1) it demonstrates obedience to the Constitution; (2) it preserves a moral sense of fairness in the proceedings for all; and (3) it prevents the redundancy in time and cost for a retrial, which does violence to the preference in the law for finality of judgments. The foregoing considerations demonstrate the profound constitutional, moral, and practical cost of inadequate translation in criminal proceedings. The cost in what is lost is more than the system should bear.

> In a country which was settled by alien immigrants and which continues to receive hundreds of thousands of immigrants and foreign travelers annually, the problem of protecting the rights of the non-English speaking accused cannot continue to be ignored by our judicial system. . . Our legal system must be flexible and must be able to adapt itself to fit the situation by giving importance to the protection of the substantive rights of the individual and must not be bound by technical or artificial procedural devices.

> Each English-speaking "citizen" of the United States is outraged and belligerent when he reads of the problems encountered by a fellow citizen involved, innocently or otherwise, in a crime in a foreign country in which that same person is tried and sentenced in the "foreign" country according to the "foreign" legal system. Each person can empathize and imagine himself in an alien society confronted by a strange legal system, with his future hanging in the balance of justice, and not able to understand any of the testimony being offered against him. . . His only contact with the proceeding would be the points his court-appointed counsel thought important enough to be communicated to him. [Benjamin G. Morris, *The Sixth Amendment's Right of Confrontation and the Non-English Speaking Accused*, 41 Fla. B.J. 475, 481-82 (1967).]

Appellate review is the last bulwark or bastion of protection of non-English speaking defendants' constitutional rights. However, often times meaningful review of interpretation issues is a mere illusion since appellate courts are constrained by the record of proceedings in the lower court. A transcript produced by an English-only court reporter is obviously insufficient for adequate review, as the court reporter cannot reproduce the foreign language interpretation. A practical reform would be moving to video or audio recording of any proceedings where the issue of the comprehension of non-English speaking defendants would arise and/or interpretation is performed. Technological advances, and corresponding price drops in video and audio technology, render this a reasonable solution to ensure satisfactory appellate review. A tangible record is an absolute necessity in order for an appellate court to be able to examine any error.

However, the due process challenges for non-English speaking defendants are comprehensive, and extend before the trial even starts:

> Cultural and language barriers may affect whether a defendant is able to make a voluntary confession, knowingly and voluntarily consent to a search, waive the right to trial by jury, or fully understand the elements of the charge, the rights waived, and the effect of the plea in a plea bargain proceeding. Lack of knowledge of the American legal system, rights under the Constitution, English language difficulties, and cultural background differences, along with other factors, have been considered in judicial assessments of whether there is a voluntary and knowing waiver of such rights. [Richard W. Cole, Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. New Eng. L. Rev. 193, 196 (1997).]

Whether an interpreter is appointed for a defendant lies wholly within the discretion of the trial judge. While the law accords courts discretion in this area, it cannot be abused. Again, it is incumbent on the defense to preserve the record for appellate review.

> The right to a court-appointed interpreter in criminal proceedings is squarely within the discretion of the trial judge. Only in limited circumstances have appellate courts held that the failure of trial courts to afford adequate interpreter services constituted an abuse of discretion or was clearly erroneous in violation of a defendant's federal or state constitutional or statutory rights.
>
> Although different judicial tests have been applied to determine if failure to provide an interpreter was error, appellate courts appear to focus the inquiry on whether a defendant had been denied a fair trial or whether the proceedings were fundamentally unfair, considering the totality of the circumstances. The review is highly factual and varies from case to case. Where a trial court has failed to appoint a qualified interpreter, the burden falls on the criminal defendant to show that his lack of comprehension of the proceeding was so complete that the trial was fundamentally unfair. [Richard W. Cole, Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. New Eng. L. Rev. 193, 196-197 (1997).]

In trying to resolve the somewhat amorphous question of "fairness" to non-English speaking defendants, reviewing courts' analysis would be informed by considering the following questions:

1. Did the non-English speaking defendant have counsel, and, if so, was the defendant able to consult with and assist his or her attorney?

2. Did the defendant possess sufficient fluency in English to understand the testimony heard, the charges alleged, and the rights recited, or was he or she significantly inhibited in the ability to comprehend any portion of the proceedings?

3. Did the defendant understand and respond to questions during examination without substantial difficulty?

4. Did the defendant inform the trial court that he or she required an interpreter in order to make each and every aspect of the criminal proceeding comprehensible, or should the trial court have recognized that the

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defendant's comprehension at trial was significantly inhibited by language difficulties, and, if so, was interpretation provided at all times?

5. Were the indictment and other critical written documents translated and provided in writing to the non-English speaking defendant in his or her own language?

6. Was the defendant actually prejudiced by his or her inability to comprehend any portion of the proceedings?

7. Did the defendant knowingly and voluntarily waive the right to have an interpreter at trial?

Other questions asked by appellate courts to ensure that criminal proceedings themselves were fundamentally fair and that the defendant preserved his or her legal rights include:

1. Was the interpreter "certified" or "qualified"?

2. Was the interpreter competent and impartial?

3. Was the interpretation generally accurate?

4. Did the defendant alert the court in a timely fashion of the deficient qualifications or lack of impartiality of the interpreter or timely object to the lack of accuracy of the interpreter services provided?

> Factors that courts consider in determining a defendant's need for an interpreter are the defendant's length of stay in the United States, the nature of his or her professional or social interaction while residing in this country, as well as occupation, education, intelligence level, and citizenship status. Some courts will focus only on the defendant's level of fluency in speaking English. [Richard W. Cole, Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. New Eng. L. Rev. 193, 198-199 (1997).]

Courts have generally taken a flexible, commonsense approach to ruling on the adequacy of interpretations of *Miranda* warnings for non-English speaking defendants:

> Generally, when police show a card containing *Miranda* warnings in the non-English speaking defendant's language, it is sufficient to permit a waiver of rights if the defendant has read the card and indicates an understanding of what he has read. . . To create a record on which to appeal a court's ruling that *Miranda* warnings were adequately interpreted, a defendant must introduce evidence of the questionable interpretation practices of the interpreter, the terms or legal concepts misused, or evidence demonstrating a defendant's lack of comprehension. [Richard W. Cole, Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. New Eng. L. Rev. 193, 203-204 (1997).]

Adequate recitation of *Miranda* warnings does not end the analysis of whether a pre-trial statement is admissible:

> [M]any courts preserve constitutional guarantees by their examination of the voluntariness of waiver or consent. The use of testimony by linguistic experts has become increasingly common in challenges to voluntariness. However, evaluation by private experts may be unavailable to the poor defendant dependent on public resources for his defense. [Note, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 Am. Crim. L. Rev. 1395, 1404 (1999).]

As with any right in trial, failure to timely raise the issue will result in an enforceable waiver:

> When either the defense or prosecution questions the qualifications or competency of the interpreter, contests the interpreter's ability to communicate with the defendant or witness, or challenges whether the interpreter is unbiased, counsel should request a hearing prior to trial to examine such competence or bias, which may include a voir dire of the interpreter. If misinterpretations are claimed during trial, objections should be made outside the hearing of the jury.
>
> During the trial, the prosecution or defense may challenge inaccurate or incomplete interpretations to cure them. *** Objections to trial interpretation errors must be made in a timely fashion or they are generally waived. [Richard W. Cole, Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. New Eng. L. Rev. 193, 222 (1997).]

A practical solution to any interpretation dispute is to have a party pose their question anew so that it may be reinterpreted.

Of course, courts must be mindful of the malingering defendant who, upon arrest, has suddenly lost much or all of their functional English. But just as courts regularly convene hearings on competency or the alleged insanity of defen-

dants, so too could a hearing be convened to accurately gauge the defendant's English language deficit and need for an interpreter. In this vein the court should consider and police should investigate whether the defendant had English speaking only friends, worked in an English speaking work environment, had English speaking interactions with the police or other state's witnesses, and consider any documentary evidence that suggested English proficiency, such as magazines, books, receipts, bills, and letters. Thorough investigation by the police will also assist courts in dispatching of specious postconviction claims. After conviction and incarceration, an empty and self-serving claim of "I didn't understand," by a defendant with nothing to lose, without more, is not enough to trigger the postconviction machinery of the courts. Vigilance against false claims will insure that this important issue will continue to be treated seriously instead of being denied with a wink and a smile rubber stamp denial.

The criminal justice system must do better to preserve the rights of non-English speaking defendants. Consider Lady Justice, blind to all but imparting justice for everyone, not just English speakers. Rights and testimony at trial must be communicated and understood in order to preserve the constitutional order, honor fundamental fairness, and prove that Lady Justice is more than a mere token. ■

Judge Donna Carr
Ohio Court of Appeals, Ninth Appellate District
161 South High Street
Akron, Ohio 44308

The Ninth District Court of Appeals covers a four-county jurisdiction with over 1.2 million residents. In that district, Lorain County has one of the highest Spanish speaking populations in Ohio. Prior to being elected to the appellate bench, Judge Carr served as a Judge of the Akron Municipal Court and as Summit County Prosecuting Attorney. Judge Carr currently serves on the Interpreter Services Subcommittee of the Supreme Court of Ohio's Racial Fairness Implementation Task Force. In addition, Judge Carr has been active in many community and professional organizations, including the Summit County Domestic Violence Taskforce.

Assisting on this article was **Judicial Attorney Paul Michael Maric** of the Ninth District Court of Appeals. Previously, Mr. Maric was an Assistant Prosecuting Attorney for Summit County in the Criminal Appeals Division.

THE NEW COLOSSUS

Not like the brazen giant of Greek fame, With conquering limbs astride from land to land; Here at our sea-washed, sunset gates shall stand A mighty woman with a torch, whose flame Is the imprisoned lightning, and her name Mother of Exiles. From her beacon-hand Glows world-wide welcome; her mild eyes command The air-bridged harbor that twin cities frame. "Keep, ancient lands, your storied pomp!" cries she With silent lips. "Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest- tossed to me, I lift my lamp beside the golden door!"

by Emma Lazarus, New York City, 1883

A "Babble of Voices": Protecting Your Non-English Speaking Client's Constitutional Rights

by Karen Maurer

"Without qualified interpretation of courtroom proceedings, the trial is a 'babble of voices,' the defendant is unable to understand the nature of the testimony against him or her, and the counsel is unable to conduct an effective examination." ~ Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts

Imagine that you are on vacation in South America when you are suddenly arrested by local police. Imagine further that you speak very little Spanish. You are whisked away to the local police department. The officers are talking to you, questioning you; you only manage to understand an occasional word spoken. All you hear is a babble of voices. You try to ask for a phone call. A phone call? Defendants are not given "a phone call." You attempt to speak, not realizing that everything you say is being interpreted as guilt in the crime for which you have been arrested. Eventually, an interpreter arrives. You sigh with relief.

Your relief, however, soon turns to absolute frustration and slowly, horror. The interpreter is simply carrying on conversations with the police. You are occasionally asked a question in English, often it is broken English and does not make much sense to you. You try to answer, but your six-word-spoken-sentence suddenly becomes fodder for another lengthy conversation with the interrogator. Finally, after several hours of this, you are thrown in a jail cell. You have no idea why you have been arrested. You have no idea what just transpired. You have no idea what will happen in the next five minutes, let alone tomorrow or the next five months.

When you are finally taken to the local court, again, everyone around you is speaking Spanish. You are the target of the conversation—this is clearly indicated by the gestures made towards you—but you do not understand what is being spoken to you; once again you are victim of hearing only a babble of voices. The interpreter from the week before materializes and the same scenario as before happens again: Only a few words are actually interpreted for you, while long conversations about you and your "case" proceed with no interpretation (and hence, no understanding) by you. You are eventually led back to your cell. You try to ask to call someone to help you, family, a friend, even the American Embassy, but no one understands you well enough and you are never permitted to use the telephone.

Your "day in court" arrives. You are convicted and sent to prison. You are still in South America. You have no idea for how long.

While many are thinking that such a scenario is to the point of the ridiculous and sublime, this happens every day in the United States and every week in Kentucky. This author has personally seen local examples of such a scenario. Clients who speak little-to-no English are arrested, interrogated, tried, and convicted with the assistance of interpreters who are hired simply because they are bilingual. They have no experience or training in interpreting;[1] they have no understanding of the legal system at all, let alone any legal terminology. These interpreters have no understanding of any rules of ethics. They are often nothing more than additional "arms" of the police or the prosecutors. Such denials of defendants' constitutional rights occur every day, not necessarily because anyone *intends* to deny these defendants' their constitutional rights, but because no one knows any better. It is past time for this scenario to change and Kentucky itself has recognized this.

As of January 2001, Kentucky joined the National Center for State Courts, State Court Interpreter Certification Consortium ("Consortium").[2] Kentucky has joined 23 other states in this nation by becoming a member of this important organization. As the *Introduction: Background and Purposes* section of the Consortium explains:

> Audits of interpreted court proceedings in several states have revealed that untested and untrained "interpreters" often deliver inaccurate, incomplete information to both the person with limited English proficiency and the trier of fact. Poor interpreting constrains equal access to justice for persons with limited English proficiency involved in legal proceedings. **Every state which has examined interpreted court proceedings has concluded that interpreter certification is the best method to protect the constitutional rights of court participants with limited English proficiency**. *Id* (Emphasis added).

With Kentucky's Administration Office of the Courts' decision to join the Consortium comes an additional important step to ensuring every defendant who does not speak English a qualified and adequate interpreter to secure his constitutional rights to a fair trial and due process.

Kentucky has several rules and statutes relating to court interpreters. KRS 30A.400-30A.435. KRE 604 requires that a "true translation" occur and states that KRE 702, regarding qualifications as an expert, applies to interpreters. 30A.435 requires that an interpreter be "qualified by training or experience...." While both the rule and statutes have been applied very ambiguously in courtrooms across the state, the

new association with the Consortium should ensure more consistent and adequate application.

As the Consortium Agreement 1.0 *Consortium Role* explains, the "functions of the Consortium shall be to establish court interpretation test development and administration standards, to provide testimony materials, to develop education programs and standards, and to facilitate information sharing among the member states and entities, in order that individual, member states and entities may have the necessary tools and guidance to implement certification programs."

In the United States and Kentucky, every defendant has the constitutional right to a fair trial, including the right to counsel and the right to present a defense. U.S. Constitution, 5th, 6th, and 14th Amendments; Ky. Constitution, §§ 2, 3, 11, and 13. *Negron v. New York*, 434 F.2d 386 (2nd Cir. 1970) inspired Congress to pass the federal Court Interpreters Act of 1978. In addition, basic constitutional rights that are afforded to all English-speaking persons should be afforded no less to non-English-speaking persons. These basic constitutional rights include the right of every defendant to (1) know and understand the nature of the charges against him; *United States v. Short*, 790 F.2d 464 (6th Cir. 1986) was a Kentucky case where the 6th Circuit Court of Appeals held, *inter alia*, that the government failed to meets its burden of a knowing and intelligent *Miranda* waiver by the defendant where the defendant was a West German national who was not fluent in English but was subjected to interrogation in English, even though one of the agents spoke some German. (2) be present at his own trial and to be able to hear and understand all of the proceedings and the testimony presented against him; (3) effectively cross examine witnesses against him; *See Ko v. United States*, 694 A.2d 73 (D.C. 1997) – right to confront witnesses incorporates the constitutional right to an interpreter. (4) participate in his defense; and (5) knowingly, intelligently and of his own free will waive his right to testify. U.S. Constitution, Amendments 5, 6, and 14; Kentucky Constitution, §§ 2, 3, 11, and 13.

Recently, the Kansas Supreme Court held that denial of an interpreter during closing arguments required reversal. *State v. Calderon*, Kan., No. 82, 526, 12/8/00. The majority stated that the right of presence is a fundamental right and that it includes a right to have trial proceedings interpreted into a language that the defendant understands "so that he or she can participate effectively in his or her own defense." *Id*.

The Kansas Court also cited the U.S. Supreme Court case *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), that there is a fundamental assumption underlying the adversary system, derived from the right of presence that the trier of fact will observe the accused throughout the trial. *Riggins* pointed out that how the defendant reacts, or fails to react, to the events of the trial can make a powerful impression on the jury. If a defendant doesn't understand, and is therefore unable to react, to testimony or opening or closing arguments, then the defendant has been denied a meaningful presence. The Kansas Court declared that the error "implicate[d] basic considerations of fairness," and the Court was "not permitted to determine that it was harmless beyond a reasonable doubt."

The Kansas case is illustrative of the basic constitutional rights that are violated when a defendant is denied a qualified interpreter. While there is little caselaw which states so strongly that which the Court in *Calderon* emphatically declares, this case is useful as an example of the direction the Courts are going in determining court interpreter issues.

Below is a sample motion that should be utilized (or something similar) in every case where there is even the slightest hint that a defendant may not understand English fully. Utilizing the Kentucky rules, statutes, and now its role as a member of the Consortium, there is no legal reason for a non-English-speaking defendant to not be provided a qualified interpreter. Such a provision ensures not only the protection of the defendant's constitutional rights, but ensures fewer cases reversed for inadequate interpretation, and ensures a fairness in the system that is important to all.

COMMONWEALTH OF KENTUCKY
_____ CIRCUIT COURT
INDICTMENT NO. 01-CR-0000

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. MOTION FOR QUALIFIED COURT INTERPRETER

ENRIQUE RAMIREZ DEFENDANT

Comes now the defendant pursuant to KRS 30A.405, KRE 604, §§ 2, 3, and 11 of the Kentucky Constitution and the 5th, 6th, and 14th Amendments to the U.S. Constitution and requests this Court for a qualified court interpreter and a hearing on this issue. As grounds for this motion and request for a hearing, the defendant states:

1. Mr. Ramirez was arrested on January 1, 2001. He was indicted on the charge of murder in the first degree on January 3, 2001.
2. Mr. Ramirez is a Mexican national. He speaks and understands no English. He is also illiterate in Spanish.
3. KRS 30A.405(1) states that "[a]ny person appointed as interpreter pursuant to this chapter shall be qualified by training or experience to interpret effectively, accurately,

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and impartially, both receptively and expressively, using any necessary specialized vocabulary."

4. KRE 604 states that "[a]n interpreter is subject to the provisions of these rules relating to qualifications of an expert and the administration of an oath or affirmation to make a true translation." Inherent in this rule is that the interpreter be qualified and able to make a "true translation."

5. Under §§ 2, 3, and 11 of the Kentucky Constitution and the 5th, 6th, and 14th Amendments to the U.S. Constitution every individual has a constitutional right to (1) know and understand the nature of the charges against him; (2) be present at his own trial and be able to hear and understand all of the proceedings and the testimony presented against him; (3) effectively cross examine witnesses against him; (4) participate in his defense; and (5) knowingly, intelligently and of his own free will waive his right to testify. A qualified court interpreter is mandated to afford these basic constitutional rights.

6. Pursuant to KRS 30A.415(1), it is requested that the Court of Justice be responsible for the expenses of interpreting for court appearances.

7. Pursuant to KRS 30A.15(2) and KRS 31.185 and 31.200, it is requested that funds be authorized for interpreter expenses out of court.

8. [Depending upon the trial court in which the motion is brought, reference could also be made regarding the caselaw referenced in the article.]

WHEREFORE, a qualified court interpreter is requsted to assist at all stages of the proceedings against Mr. Ramirez. In addition, a hearing on the matter is requested.

Respectfully submitted,

_____
COUNSEL FOR DEFENDANT

NOTES:

(1) It is highly recommended that when filing this type of motion that the attorney attach a copy of the *Suggested Guide for Interpreted Proceedings* (included in this issue of *The Advocate*) as a basis for determining a court interpreter's qualifications, or, at the very least, include the points made and questions asked in the *Guide* as numbers within the motion itself. This may mitigate against those trial courts which assume their local interpreter—who happens to be bilingual but have no other training, etc.—is qualified. Also, making a request to utilize the *Guide* will ensure the entire proceedings regarding the court interpreter are done appropriately and fairly and will protect the record on appeal.

(2) Attorneys and judges who often come into contact with Spanish speaking clients or witnesses should become familiar with the rules of ethics governing interpreters. A good starting point for this is the National Association of Judiciary Interpreters and Translators (NAJIT). *See* http://www.najit.org/.

(3) Attorneys and judges should request resumes or C.V.s and evaluate the credentials of the interpreters they plan to hire. Professional organizations such as NAJIT can assist in evaluating the adequacy and qualifications of the interpreter. *See* the other articles in this series also in this issue of *The Advocate*.

ENDNOTES

1. Are you considering becoming a court interpreter? *See Suggested Guide for Interpreted Proceedings* at page in this issue. *See also* "Qualifications for court interpreting" available at http://www.ncsc.dni.us/RESEARCH/INTERP/Qualifications.htm.
2. Information provided in this article regarding the Consortium can be found at http://www.ncsc.dni.us/RESEARCH/INTERP/Agreement.htm. ■

Karen S. Maurer is an attorney with the Department of Public Advocacy in the Appellate Branch. She has several cases that have expanded her knowledge, understanding and concern of court interpreter issues. She welcomes any questions or comments regarding court interpreter issues.

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Ricardo Ocampo, an interpreter and translator, assisted in the writing of this article is. He can be reached by e-mail: raocam01@hotmail.com.

SUGGESTED GUIDE FOR INTERPRETED PROCEEDINGS

by Isabel Framer

To secure the rights, constitutional and otherwise, of persons who, because of hearing, speech, or other impairment a party to or witness in a legal proceeding cannot readily understand or communicate, the court shall appoint a qualified interpreter to assist such person. Before entering upon his duties, the interpreter shall take an oath that he will make a true interpretation of the proceedings to the party or witness, and that he will truly repeat the statements made by such party or witness to the court, to the best of his ability. See ORC 2311.14 (B); 28 USC section 1827; Evidence Rule 604.

Administration of Oath and Establishing Qualifications

Evidence Rule 604 provides that the provisions of the rules relating to qualification of an expert are applicable to interpreters. An expert is one qualified by knowledge, experience, training or education. See Evidence Rule 702.

OATH

Do you solemnly swear or affirm that you will interpret accurately, completely and impartially from the source language into the target language, using your best skills and judgement in accordance with the standards prescribed by law and the code of ethics for court interpreters; follow all official guidelines established by this court for legal interpreting or translating, and discharge all of the solemn duties and obligations of legal interpretation and translation, so help you God.

Suggested Questions for Establishing Qualifications

1. Please state your full name and prior experience, training or education in court interpreting.
2. Have you interpreted for this type of hearing or trial before?
3. How many times have you interpreted in court?
4. What types of hearings have you interpreted before?
5. Are you familiar with the legal terminology from the English language into the target language? *See State v. Alejandro Ramirez,* Ohio App. Eleventh District, Lake County (1999).
6. What prior education or training have you had in court interpreting?
7. Are you able to interpret simultaneously and consecutively without leaving out, changing or summarizing anything that is said? (It is highly recommended that the summary mode should not be used. *See State v. Pina*, 49 Ohio App.2d, 394 (1975)) *State v. Ramirez*, supra.
8. Do you know the parties or are you related to any of the parties in this case?
9. Do you have a financial or other interest in the outcome of this case?
10. Have you had the opportunity to speak with the client to determine if there is any communication problem? (It is recommended that the attorney be present during any communication between the interpreter and a non-English speaking defendant or witness to avoid having the interpreter become a potential witness. The interpreters should never carry on independent communication with a witness or defendant. *See State v. Fonseca*, 1997 WL 749397 at *3 (Ohio App.11 Dist.1997).

To the Interpreter

1. Do you understand that while serving in an official capacity you are bound by the attorney/client privilege and any confidential information provided to you by any of the parties must be kept confidential?
2. Do you understand that you cannot give any legal advice or interject your own personal opinions not related to language expertise? See: State v. Rodriguez (1959), 110 Ohio App.2d 394, 398, State v. Ramirez, supra.

To the Attorneys

1. Are you satisfied with the qualifications of the interpreter(s)?

To the Defendant(s)

1. Are you able to effectively communicate with your attorney through the interpreter and are you able to understand the interpretation provided to you by the interpreter?

For the Record

1. I find that the interpreter is a qualified interpreter, that all parties have agreed to the qualifications of the interpreter, and that the defendant is able to understand and communicate through the interpretation provided by Mr./Mrs. _____. Therefore I will appoint Mr./Mrs. as the interpreter on this case.
2. I will ask that all parties when speaking directly to the defendant or witness speak in the first person and that the interpreter when interpreting for a defendant or witness to respond in the first person. The third person should be used only when the interpreter is speaking for herself. Example: Your Honor the interpreter is unable to hear the attorneys; Your Honor the interpreter would request a brief moment to consult her dictionary. *See State v Pina*, supra; *State v. Nieves*, 1990 WL 20882 at *3 (Ohio App. 11 Dist.1990); *State v. Fonseca*, supra.

Answers to Frequently Asked Questions

1. During a trail and court proceedings it is suggested to periodically ask a defendant if he/she has been able to understand the interpretation provided and if he has

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been able to communicate adequately with his attorney through the interpreter, specifically during plea entries.

2. It is suggested to ask a defendant to repeat some of the information the judge has provided to see if the defendant understands the interpretation. A defendant might not be able to repeat exactly what the Judge has said but could provide a general idea of his understanding. Also, the fact that a defendant may not understand does not necessarily mean that the interpretation is error. A misunderstanding could mean that the defendant is not able to grasp the concept of our judicial system. Therefore, by inquiring further the Judge would have the opportunity to explain in terms that a defendant could understand.
3. It is recommended that summary interpretation not be used. Only unqualified interpreters who are unable to keep up in the consecutive or simultaneous modes of interpretation most often use it. Summary interpretation will not provide a defendant with a true and accurate interpretation of court proceedings or testimony of a witness.
4. The simultaneous mode is used during all court proceedings where the non-English speaking person is listening or for any non-English speaking party when the judge is speaking directly to that person without interruptions (*e.g.*, trial, jury instructions, the judge is speaking to an officer of the court or any other person other than the defendant or witness, lengthy advisement of rights, and judges remarks to a defendant at sentencing.)
5. Consecutive mode is used when a non-English speaking person is giving testimony or when the judge or officer of the court is communicating directly and is expecting responses.
6. Sight translation is the oral translation of a written document into the target language. The interpreter must be given a few minutes to review the document before translating.
7. It is suggested that friends and family members not be used to provide interpretation in any legal setting. Friends and family members are not neutral parties and might have an interest in the outcome of the case. In addition they are not trained in court interpretation.
8. Being bilingual is not sufficient for being a court interpreter. Court interpreting is a highly skilled profession that requires training, education, experience and knowledge of legal terminology in both languages.
9. It is recommended that attorneys not be used to interpret court proceedings. Bilingual attorneys cannot function effectively in their duty as attorneys and perform interpreter duties at the same time. They are not trained or posses the skills required for court interpretation. *See State v. Sanchez*, 1986 WL 4949, (Ohio App. 8 Dist. 1986).
10. For a trial or a very lengthy hearing or lengthy multiple witnesses testimonies of non-English speaking parties, two interpreters should be appointed in order to avoid mental fatigue. The United Nations standards for conference interpreting (simultaneous mode) call for replacing interpreters every 45 minutes. Court interpretation is more demanding than conference interpreting. Studies have proven that even the most qualified trained interpreter is unable to interpret adequately and that the quality of interpretation will falter during lengthy hearings.
11. There is no state certification or certifying body currently in the State of Ohio.
12. Language agencies do not certify interpreters.
13. Some language agencies do not qualify interpreters. You may want to inquire as to the methods that an agency uses to screen candidates for language proficiency and/or if they provide training for court interpretations.
14. Court interpreters are highly skilled professionals who fulfill an essential role in assisting in the administration of justice.
15. Once interpreters are sworn in they become officers of the court and should abide by all the rules pertaining to officers of the court and their duty to interpret accurately.
16. Interpreters are and must always remain neutral parties regardless of who has hired them. Interpreters are a communication vehicle to assist all parties in communication and in the administration of justice. All persons benefiting from the interpreting services are clients.
17. Interpreters cannot give legal or any other advice to any of the parties.
18. Interpreters cannot serve as the interpreter if they are acquainted to or related to the party nor have a monetary interest or other interest in the outcome of the case.
19. Translation is the replacement of a written text from one language into an equivalent written text in another language.
20. Interpretation is the oral translation of a language into another language. Both require different skills, training and knowledge.

Disclaimer

The information I am providing in this outline is information that has been passed down to me through, NAJIT (The National Association of Judiciary Interpreters and Translators), NAJIT's electronic discussion list of Federal, State Certified Interpreters and Free-lance Interpreters, NCSC (The National Center for State Courts) and from States that have implemented court interpreting standards and certification.

This information is only a suggested guide and it is not my intent to interpret the law. If you have any questions please call: ■

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EFFECTIVE COMMUNICATION WITH NON-ENGLISH SPEAKING CLIENTS

by María Cristina Castro

While using a court interpreter will lessen language obstacles between parties in legal proceedings, the rendition of the speaker's message into a different language may not always convey the speaker's intended message because the words needed to convey the message may exist in the target language but the concept they represent may not. Awareness of some of the differences that exist at the intersection of law, language and society when different cultures come in contact may contribute to better communication with non-English speakers through a court interpreter. The following are examples of concepts arising in a criminal law context in the U.S. and of the misunderstandings that may occur when they are interpreted into Spanish but not explained. Although the examples given often refer to the understanding of these concepts that a native of Mexico may have, the reader is encouraged to relate them to communicating with clients from diverse linguistic and cultural backgrounds.

FELONY V. MISDEMEANOR

The difference between a felony and a misdemeanor is not necessarily clear in Civil Code countries, such as Mexico. Many of these nations have three different kinds of offenses rather than two. An approximation would be what we consider major felonies, minor felonies and petty offenses. Thus, whichever word your court interpreter uses to convey *felony* or *misdemeanor* into language *x*, it may not be a true match. It is recommended that you, the attorney, defines the term for the client as you say "the offense you are charged with is a felony, this means that you could face a sentence of..."

OFFENSES

The 51 criminal codes of the United States are more specific in naming offenses than those of Civil Code countries. For example, Mexico has a Penal Code chapter entitled "*Robo*" that includes theft, robbery, armed robbery, aggravated robbery and shoplifting. Each one of these would be considered a different offense under the various criminal codes of the United States. The equivalent of *burglary* takes four to eight words to express in Spanish.

RELEASE CONCEPTS

All concepts having to do with release require definition: parole, probation, release on own recognizance, supervised release, pretrial release, work furlough, work release, release to a third party –including pretrial release agencies. There are no direct equivalents for these concepts in many other systems of law, languages and societies, and many of these concepts and names of programs vary from jurisdiction to jurisdiction within the United States. Thus, it is recommended that counsel always define these terms after naming them, and that you do not use acronyms. Ask your client "Do you know what I mean by probation, by parole, by pretrial release services?" If the client replies "no", proceed to define. If the clients says "yes" ask the client to tell you what it means.

MIRANDA

The Miranda warnings contain many concepts that are culture bound. "Right to remain silent" does not necessarily convey the meaning of not incriminating oneself. "Everything you say" means everything you say about the offense the police are investigating. "Right to counsel" probably has equivalents in most languages, but "afford" may not. "Having a lawyer present" does not convey in other languages, nor to members of other cultures, the intended meaning of having a lawyer present to assist and advise. "Do you want to make a statement" does not convey the necessary specificity in Spanish: make a statement about what? In fact, the English does not provide the specificity either, but the content and intent of Miranda is widely known and understood in contemporary American culture and society.

Thus, if you want to know if and how your clients were read their rights, it is suggested that you do not ask if they were "mirandized" -a perfect example of a culture bound term. Do not ask if they were "given" their rights and do not ask if they were "read" their rights. Think what would happen to those questions in English once we remove all the cultural and societal knowledge that goes with Miranda. What you should do is ask your clients if the officer read to them, or gave them to read on their own, a card or paper that, in their own language, told them the following:

1. they were under no obligation to talk to the police about the incident,
2. if they talked to the police about it, the information could be used to prosecute them,
3. they could ask for a lawyer to defend them exclusively and free of charge before talking to the police,
4. their lawyer could be present while they talked to the police, and
5. these are legal rights they have under the law of this state/country. "Do you understand what they mean? Do you want to talk to me about what happened?"

TRIAL

This is a classic example of a word that exists in almost every language, representing a completely different reality in every

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one of them and to every society that speaks the language. While we know *trial* to represent the proceeding during which evidence will be heard by the finder of fact, be it the judge or the jury, this is not a concept shared by all societies or languages. Jury trials are not held in Mexico and most countries in Central and South America, yet they are in some of these nations. Further, the word most frequently used by English/Spanish court interpreters when rendering *trial* into Spanish refers to the entire prosecution of a case in most Spanish speaking nations, not to the proceeding during which evidence is heard by the trier of fact. Thus, if you ask your clients "Do you know what a trial is?" and your clients reply "yes," you still don't know whether the meaning of *trial* as you know it is understood. Thus, if your clients reply that they do know what a trial is, ask the clients to tell you what it means in their own words.

JURY

The word *jury* also exists in other languages, but in the case of Spanish it does not refer to the same concept as the English word *jury*. It is a word Spanish speakers seldom use and it derives from the verb *to swear* -avow- in Spanish. Thus, *trial by jury* in Spanish may sound to a native speaker like *a judgment by a sworn one*, which is too general a meaning to be understandable. Sworn to do what? It would be best to define, in English, *trial by jury*, *bench trial*, *jury*. This will allow the interpret to interpret your definitions into the target language.

FROZEN LANGUAGE

The English language is said to be a Germanic language. This is true as far as establishing its birth place. When the Normans invaded Great Britain they brought their culture with them. The English language incorporated to its vocabulary lots of Latin via French, while Norman law was over imposed on the existing system. Legal English thus developed lots of *couplets* or *frozen language* expressions that contain both a Germanic and a Latin origin word meaning approximately the same thing, such as *fit and proper*, *aid and abet*, *cease and desist*. Spanish, being a modern grandchild of Latin, does not require this redundancy to express these concepts; if these concepts are rendered into Spanish as a couplet they come out much like *fit and fit*, *aid and aid*, or *cease and cease*. Thus, do not be surprised if you utter a phrase full of these couplets and your interpreter is done speaking before you are.

WAIVER OF RIGHTS

When asking defendants to waive or give up their rights, their perception may well be that all legal rights are being waived for all time, including rights relating to events in the future on matters having nothing to do with the case at hand. In the case of monolingual speakers of Spanish, a factor that contributes to the confusion is that *to waive* in Spanish also means *to resign* as in resigning from a job. You may want to advise your clients -in English and through a court interpreter- that waiving ones' rights means to give up one's trial rights only and as to this charge only.

THE "PLEA"

Many languages and societies do not have a word or a legal concept equivalent to *plea.* The meaning of the word most commonly used for *plea* in Spanish overlaps with that of statement and testimony. If the defendant wishes to enter a guilty plea, the attorney should explain that this means that the defendant admits guilt, recognizes having committed the offense, and that upon hearing this admission of guilt the judge will enter a finding of guilt and sentence the defendant. Again, the concepts of guilty, not guilty and no contest pleas need to be defined for your clients. In the case of a plea of no contest, the interpreter assigned to the case will arrive at an equivalent term in the target language that, hopefully, will be used consistently throughout the pendency of the case.

PRISON AND JAIL

Concepts and words for jail and prison differ from language to language and from society to society. For instance, the Spanish word for prison does not mean federal or state correctional institution, but rather being held either in county jail, the courthouse hold or a state or federal correctional institution. If counsel wishes the non-English speaking defendant to understand the difference between jail and prison, definitions of these U.S. concepts need to be provided in English and then interpreted into the target language.

FAMILY NAMES

The number and order of given names and of surnames vary from society to society, beyond the boundaries of language. Natives of Mexico tend to use two surnames, those belonging to their father and to their mother, but they may not have a middle name. The father's surname is given first, thus Juan Silva Ramírez is Juan, son of Mr. Silva and Ms. Ramírez. Juan José Silva Ramírez is Juan José, son of Mr. Silva and Ms. Ramírez. In order to avoid confusion you should ask your client: "What is your father's surname? Your mother's? Your first name? Do you have a middle name?" If your client belongs to a social group where two surnames are used, you may hyphenate them in order to preserve the proper order: Juan José Silva-Ramírez, but remember that hyphenation is a function of English grammar, not Spanish. Do not ask your client if the surnames are hyphenated, they certainly are not in Spanish and the question may not be understood. If Juan José Silva-Ramírez marries Beatríz Sánchez-Guzmán, Beatríz either becomes Beatríz Sánchez de Silva or remains Beatríz Sánchez-Guzmán. If they had a daughter named Alicia, she would be Alicia Silva-Sánchez. It is important to remember that this is not the case in all Spanish speaking social and cultural groups. Do not assume, ask.

In other languages and cultures the surname is listed first,

followed by a marker of the persons's gender, which is followed by the given name or names. If you don't want your client to be listed with a myriad of AKAs that are actually permutations of the same true name, ask your client through the interpreter which are the given names and which are the surnames.

USE OF FIRST NAMES

Some societies consider the use of first names during first encounters as friendly, others as overly familiar or even as disempowering. Western Americans tend to view it as friendliness, New Englanders view it as overly familiar, members of oppressed groups may view it as disempowering, older Americans as disrespectful. Some languages -regardless of the cultural mores of the different social groups that speak that same language- give the speaker the option of addressing people not only by using first or last name, but also by combining these two possibilities with formal and informal pronouns. Most social groups consider consultation with counsel as a formal situation. It is recommended that you don't address the non-U.S. client or witness by their first names until a relationship has been established, if ever, especially if they are considerably older than you are.

EDUCATION

Clients are frequently asked questions regarding their formal education. Much as in English, words such as primary school, secondary school, college, etc., do exist in Spanish, although they represent a different reality for different social groups. In Mexico primary school consists of six grades and is government sponsored, but in rural areas there may not be adequate transportation available to school; secondary school comprises grades seven, eight and nine and is both public and obligatory, but transportation problems are even greater than those encountered in attending primary school; preparatory school covers grades ten, eleven and twelve. Although there are some public preparatory schools, they are in urban areas and out of the reach of most rural families. Further, this level of education is not obligatory. Therefore, there is no equivalent of the U.S. concept of "High School," since it includes all or part of the Mexican concepts of secondary school and all of preparatory school, but there is no conceptual equivalent of grades 7-12 as public, obligatory and at nearly everyone's reach.

DOES THE DEFENDANT NEED AN INTERPRETER?

The court interpreter is neither a cultural anthropologist nor a comparative law scholar. It may be that a non-native speaker of English does not need a foreign language court interpreter nearly as much as an explanation of the legal concepts and proceedings as they come up during the pendency of the case. If you can communicate in English with your client, you may want to ask yourself if, foreign *accent* aside, "do my client and I communicate any better or worse in English than is the case with my English speaking clients?" These are some questions you may ask your client: "How long have you been in this country? Do you speak English with your friends? At work? Have you gone to school in either language/country? What is it you don't understand, the legal concepts or the English words I am using? Would you understand them in your native language? Do you realize that the court interpreter says the same things I am saying, only in your native language? The interpreter is not going to explain things to you, do you want me to explain these things to you in English or through the interpreter?"

On the other hand, your client may prefer to speak in the native language in order to do so more eloquently and without a foreign *accent* which may impede understanding by the listener, even though everything you say in English is understood. This should be a consideration if your client is to testify.

The following are general recommendations when speaking through an interpreter:

1. Never use acronyms or shorthand, speak in full words. DUI, DA, Recog, etc. are impossible to interpret, let alone understand in English.

2. Always define legal concepts, nature of proceedings and settings, do not just name them.

3. Always explain the roles of the parties involved, such as judge, prosecutor, supervised release officer, probation officer, interpreter, trial assistant, etc.

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Free Translations Via the World Wide Web

by David T. Miller

Cheap computing power and the continuing expansion of the World Wide Web are producing some amazing tools for the legal professional. By now, free full-text online searches of opinion and statute databases is routine, and younger attorneys may not even recall the era—way back in the twentieth century—when such information was scarce and expensive.

One of the most useful developments is the emergence of free, instant online translation sites. These sites can translate any text you put in, and you can choose from Spanish, French, German and many other languages. Some go further—at http://translator.go.com, for example, you can simply type in a web address and the service will present that website to you in the language you choose. The few seconds' delay as you move around the site is noticeable but not too annoying.

The translations aren't perfect. As a test I took a section of the Bankruptcy Code (11 USC Sec. 341) that provides for the meeting of creditors and ran it through the free translator. Here's the original (for clarity I removed the section numbers):

Meeting of creditors and equity security holders. Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors. The United States trustee may convene a meeting of any equity security holders. The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors.

Here's how the service rendered it in Spanish:

Reuniones de acreedores y de sostenedores de la seguridad de equidad. Dentro de un tiempo razonable después de la orden para la relevación en un caso bajo este título, el administrador de Estados Unidos convocará y presida en una reunión de acreedores. El administrador de Estados Unidos puede convocar una reunión de cualquier equidad sostenedores de la seguridad. La corte puede no presidir en, y puede no atender, cualquier reunión bajo esta sección incluyendo cualquier reunión de acreedores.

My Spanish isn't very good, but I think this translation would be enough to give me the basics. If you needed to know how to go about finding local counsel in a remote

town in Spain, or to make air travel arrangements to Portugal—or from Portugal to here—in a hurry even imperfect translations could save you plenty of time and money.

Or, look at it from the opposite direction. Lexmark, for example, maintains a Spanish version of its corporate website. An introductory paragraph says that

Lexmark es una empresa con operaciones a nivel mundial que desarrolla, fabrica y comercializa soluciones y productos de impresióón, incluyendo impresoras lááser, matriciales y de inyecciióón de tinta y los suministros correspondientes para los mercados del hogar y de oficina. Durante 1997, las ventas de impresoras y de suministros de consumo representaron cerca del 80 por ciento de los 2.500 millones de dóólares en ingresos de Lexmark.

Translator.go.com took about four seconds to translate this as:

Lexmark is a company with operations at world-wide level that develops, makes and commercializes solutions and products of printing, including laser printers, matrix and of office and red injection and the corresponding provisions for the markets of the home. During 1997, the sales of printers and provisions of consumption represented near the 80 percent of the 2,500 million dollars in income of Lexmark.

Not great prose in translation, but certainly intelligible.

Obviously, online translation is still in its infancy, and we're a long way from Start Trek's Universal Translator. But we're a lot closer than we were just a few years ago. The biggest remaining obstacle is the fact that even the most sophisticated automated system lacks the flexibility and common sense of a human translator. More and more, however, humans will use machines to do the heavy lifting of translation, intervening only to make the final product more idiomatic.

Mark Twain's short story " The Celebrated Jumping Frog of Calaveras County" was translated into French and Twain produced a scathing, hilarious re-translation back into English by translating it literally: "Eh bien! I no see not that that frog has nothing of better than another." Machine translation can produce similar results. I ran translator.go.com's Spanish translation of the Bankruptcy Code section above back through the translator and it responded with:

Meetings of creditors and sostenedores of the fairness security. Within a reasonable time after the order for the relevación in a case under this title, the administrator of the United States will summon and preside over in a meeting of creditors. The administrator of the United States can summon a meeting of any fairness sostenedores of the security. The cut can not preside over in, and can not take care of, any meeting under this section including any final meeting of creditors.

I suppose the gist of it is that the "cut" doesn't get involved until the "fairness sostenedores" have done their work.

Online translation services may be of the greatest benefit to two types of legal practice. The first and most obvious is the larger firm, with an international clientele. Lexington is, after all, the horse capital of the world, and local attorneys should be able to communicate with their counterparts wherever great horses are appreciated.

But Lexington also has a growing community of Hispanic and other ethnic groups for whom English is a second language, if it's spoken at all. There's little doubt many of their legal needs are unmet. Automated translation could be a way to begin to remedy that, allowing even the smallest practice to understand and address such needs without relying on a human translator at every step.

Do you have a website in English? You may not know it, but thanks to automatic translators on the Web you already have one in Spanish–and French, German, Portuguese and many other languages too. ■

BREAKING THE SILENCE: INTERPRETERS FOR THE DEAF

by Bob Hubbard

- You represent a deaf driver, who incurred a dislocated shoulder while being forcibly removed from his vehicle for failing to respond to directions from the police, directions he never heard.
- What about the deaf person who reportedly "refused the breath test" by not blowing harder after being instructed to?
- Then there's the deaf inmate forced to serve out his sentence after failing to avail himself of the opportunity to appear before the Parole Board due to his inability to understand the written instructions for obtaining a hearing.
- Don't forget about the deaf man arrested on a bench warrant after he failed to respond in court when his case was called.
- And there's the deaf juror who was excused from jury service before you could question him to see if he could sit on your client's case.

All the above are real life situations in which, at the appropriate time, the presence of an interpreter could have made a difference for your client and for fair process and reliable results in our criminal justice system.

THE DEAF CULTURE

Studies conducted during 1996 by the National Center for Health Statistics reveal that there are approximately 22 million individuals, approximately 9% of the total U.S. population three years of age and older with reported hearing problems. Of that number between 421,000 and 1,152,000 are considered deaf. This wide variance is attributable to the fact that there is no legal definition of deafness.

These deaf individuals in America comprise a distinct, separate subculture of our society. A subculture with its own language, social hierarchy and values. Often viewing themselves as outsiders in a hearing world, they form tight knit groups and are reluctant to interact with the hearing world unless necessary. As a result of these differences the deaf population faces problems in every area of their life, in social situations, employment, education, etc.

These cultural and linguistic differences pose special problems for the deaf and hearing populace as they attempt to establish effective and meaningful communication. These problems are confronted and communication established however, through the use of an interpreter.

THE INTERPRETER

In general, an interpreter should be used when requested by a deaf person in order to communicate effectively and as a means of insuring equal access to services. Circumstances to be taken into consideration in providing an interpreter include:

- Communications skills of the deaf person
- Number of people involved in the communication
- Importance of the communication
- Length and complicated nature of the communication

By the time these deaf individuals require our assistance, not just any interpreter will do. In the judicial process, as well as in many other situations nothing less than a "qualified interpreter" is required. *See generally*, Internal Policy of the Kentucky Administrative Office of the Courts, Order Adopting Part IX, Procedures for Appointment of Interpreters of the Administrative Procedures of the Court of Justice.

- A qualified interpreter is an interpreter able to interpret effectively, accurately and impartially, both receptively and expressively, using any necessary specialized vocabulary. *See* KRS 30A.405(1).

Who is qualified however, may depend on a number of factors as the deaf or hard of hearing do not always communicate in the same manner. The manner of an individual's communication is dependent upon: type of hearing loss and their age at the time of the loss; their education and speech abilities; social factors; their personality and communication preferences. Some utilize American Sign Language (ASL), others use pidgin or Signed English, and others speech reading or "home" signs.

THE LANGUAGE

Like many other languages, Spanish, German, French, etc, the language of the deaf is considered, treated and taught as a foreign language. In fact, 16 states, Kentucky included, have specific legislation recognizing it as such. *See*, KRS 164.4785. Like these other foreign languages, ASL is not universal. Unlike these other languages however, which are of a spoken, auditory nature, ASL is a language of gesture, facial expression and physical nuance. It possesses its own grammar and syntax. It is based on the use of signs that represent a limited number of primarily concrete terms. As in any foreign language it is often difficult for words to be translated verbatim. It relies heavily on inflection to convey a great variety of information through manipulation of a root sign. In ASL, open-ended questions, abstract concepts, technical jargon and even big words cannot be used, as there is no effective way to convey their meaning.

ASL is a complete language within itself. ASL is not dependent upon English for its meaning and it bears no structural resemblance to English. Qualifiers follow, not precede nouns, events are placed in chronological order, cause and effect

relationships are generally stated as rhetorical questions, and conditional phrases are usually last. Because the average deaf high school graduate reads and writes at the fourth grade level, many have limited knowledge of English grammar rules and do not use English grammar even when writing. For example, the phrase "you must tell me what you really need the most" would, in ASL, be "your true most need tell me must." While the phrase "have you been to Kentucky" would be interpreted "touch Kentucky already you." It is due to the cultural and linguistic divergence between the deaf and the hearing populations that interpreters serve as a necessary bridge spanning the gap between two worlds.

WHAT TO EXPECT

An interpreter may be thought of as a facilitator. They do not serve as advocates, counselors or representatives. Both the Registry of Interpreters for the Deaf (RID) and the National Association for the Deaf (NAD) have established an Interpreter Code of Ethics which, as relevant for the scope of this writing, demands:

- Confidentiality
- Faithful rendering of the message
- Discretion in accepting assignments
- Remain impersonal

This Code of Ethics gives rise to other ethical restraints, require the interpreter,

- Stop the proceedings if a breakdown in communication occurs
- Make all communication accessible to the parties
- Refrain from participating in discussions about what is transpiring, i.e., remain neutral
- Avoid being or appearing to be in a position of authority so as not to intimidate the deaf person and cause them to acquiesce
- Refrain from speaking for any of the parties to the conversation

With effective communication being the objective of the interpretive services, a deaf individual may request another interpreter if the interpreter being utilized is unable to effectively communicate or if the interpreter's code of ethics is violated.

IN THE LEGAL ARENA

Within the judicial context an interpreter is warranted at the time *Miranda* warnings are given, during any interrogation, in the review of documents, in the taking of depositions, during any court proceedings, *i.e*., Grand Jury, conferences, all stages of criminal, civil juvenile, or mental inquest cases, etc. This list is of course in no way exclusive. *See also*, KRS 30A.425, KRS 344.500.

Due to the complexity and varying differences in the language and because of the complexity of legal proceedings there will be a demand placed upon the individual utilizing the services of the interpreter to spend additional time with the interpreter in order to insure accuracy in the communication process. This will often mean informing the interpreter of many legal terms they may encounter, advising them of the relevant charges and facts, the manner of the proceedings, etc. In turn, the individual may expect, and should seek out, advice from the interpreter on the most effective ways to phrase relevant questions before they are ever asked in order to avoid many problems that can occur. These communication differences further necessitate spending more time with the deaf client to insure they understand the process and the terms as well. For without the cultural and linguistic understanding of the information the deaf individual will not have the ability to comprehend many individual words much less the long often convoluted sentences used in the judicial process. The time of trial is not the time to attempt to educate your interpreter or client.

THE INTERPRETER'S APPOINTMENT

Kentucky has provided for the appointment of interpreters where the individual is:

- Detained in custody/arrested prior to any interrogation or taking of a statement. *See*, KRS 30A.400.
- In any matter before the court, criminal or civil. *See*, KRS 30A.410.

The Court of Justice is responsible for payment of the interpreter during any in court proceedings. KRS 30A.420. Out of court services must be paid for by the requesting individual/agency. KRS 30A.415. In these judicial types of proceedings, the interpreter should not be examined as a witness regarding what would otherwise be considered confidential matters, KRS 30A.430.

If you require the services of a certified interpreter you have the responsibility to inform the court of this need by contacting with the clerk of court or Court Administrator's Office. Arrangements will then be made through either the Kentucky Commission on the Deaf and Hard of Hearing (KCDHH), Kentucky Registry of Interpreters for the Deaf (KYRID) or Kentucky Association of the Deaf (KYAD) for interpreter services to be provided. Should you have a preference of interpreters, you should recommend that particular individual to the court liaison.

For other individuals working in a state agency, needing the services of an interpreter outside the courtroom setting, the Access Center Program within the Kentucky Commission on the Deaf and Hard of Hearing is available to assist you in choosing an appropriate interpreter. The need for such services outside the courtroom may occur when:

- access is needed to a public service
- the deaf person is a state agency employee
- a request made under a state or federal law
- necessary for access to a public event as defined by law

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CERTIFICATION OF INTERPRETERS

Exactly who may be the right interpreter for the job is as varied as the circumstances giving rise to the need. Whoever may be selected however must be qualified. As a measure of quality assurance the States follow two approaches in the regulation of interpreters. (1) The states may enact legislation specifically addressing the appropriate standards or (2) legislation may assign such authority to a Board, agency or Commission.

While such regulations began to appear in the early 70's it was not until the passage of the Americans with Disabilities Act (ADA) in 1990 that the impetus for quality and accessibility was felt. Today, the various state standards, viewed in combination with existing Federal law, provide comprehensive protection respecting the choice of the consumer while establishing reliable standard providers can rely upon and interpreters can achieve. The Registry of Interpreters for the Deaf (RID) and the National Association for the Deaf (NAD) serve as the yardsticks against which these interpreters are measured.

Both NAD and RID evaluations are given in Kentucky. The NAD testing includes a short interview covering the individual's knowledge of interpreting, ethics, situations, etc… followed by a performance test. This portion of the test consists of six different interpreting situations. NAD offers three levels of certification.

- LEVEL III (Generalist) – shows good sign vocabulary but may have problems in sign-to-voice
- LEVEL IV (Advanced) – does very well in sign-to-voice and demonstrates the necessary skill for interpreting almost all situations
- LEVEL V (Master) – this interpreter rarely demonstrates any difficulty in interpreting in any situation.

The RID Evaluation begins with a "generalist examination." This exam is comprised of both written and performance tests. Both must be passed for certification. The written test covers five areas.

- General Socio-Cultural Systems
- Language/Language Use
- Socio-Political Context Interpreting
- Interpreting
- Professional Values

If the written test is passed the "Candidate for Certification" has five years within which to take and pass at least one of the performance tests. Whereas the NAD Certification qualified an individual at three different levels, the RID tests may qualify an individual on four levels. These levels are:

- Certificate of Interpretation (CI) holders are certified in Interpretation and demonstrate the ability to interpret between ASL and spoken English in sign-to-voice and voice-to-sign.
- Certificate of Transliteration (CT) holders are certified in Transliteration and have the ability to transliterate between signed English and spoken English in both sign-to-voice and voice-to-sign.
- Certificate of Interpretation and Certificate of Transliteration (CI and CT) holders demonstrate competence in interpretation and transliteration
- Certified Deaf Interpreter – Provisional (CDI-P) holders are deaf or hard of hearing and have at least one year of interpreter experience, completed at least eight hours of RID Code of Ethics training and eight hours of general interpreter training designed for an interpreter who is deaf or hard of hearing. This Certificate is valid for only one year after a CDI examination is made available. Currently this exam is being developed.

In your practice you may encounter interpreters who possess other RID certifications. Those certifications have however been replaced by the above listed. The additional eight certifications you may encounter are:

- Comprehensive Skills Certificate (CSC)
- Reverse Skills Certificate (RSC)
- Interpretation/Transliteration Certificate (IC/TC)
- Interpretation Certificate (IC)
- Transliteration Certificate (TC)
- Oral Interpreting Certificate: Comprehensive (OIC:C)
- Oral Interpreting Certificate: Spoken to Visible (OIC:S/V)
- Oral Interpreting Certificate: Visible to spoken (OIC:V/S)

The interpreter serves as a voice for the silent. In doing so, although impartial, they become an integral part of the team. A team that ultimately insures that the administrative, statutory and constitutional rights of the deaf, whether in court or out of court, are not overshadowed out of expediency, ignorance or by the process itself. Their importance to both the deaf and hearing populace cannot be overstated.

For further information please contact:
Ky. Commission on the Deaf and Hard of Hearing
632 Versailles Road
Frankfort, Kentucky 40601
V/T 502-573-2604
FAX 502-573-3594
http://www.state.ky.us/agencies/kcdhh

Ky. Registry of Interpreters for the Deaf
2717 Fort Pickens Road
Lexington, Kentucky 40507
502-595-4221 ■

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Appellate Case Review

by Shannon Dupree

Shannon Dupree

Love v. Commonwealth
___S.W.3d___(2/2/01)

Reversed in part. In the early morning hours in December of 1997, a collision occurred on the Watterson expressway involving a Chrysler and a Ford minivan. Several other vehicles stopped to render assistance, including the police. Just minutes after this collision, Appellant crested the hill in his Ford Thunderbird and approached the accident scene at a high rate of speed. Appellant swerved and missed the police cruiser, but struck the minivan and a bystander, killing two persons and injuring himself. Appellant refused to cooperate with police or hospital staff. Two hours later, the hospital placed Appellant in restraints and drew a blood sample. Results from the blood serum revealed a blood alcohol concentration (BAC) of .241%. Two hours after that (four hours after accident), additional blood was drawn from Appellant pursuant to a search warrant. Results from that testing revealed a BAC of .17%.

Appellant was convicted of two counts of wanton murder, two counts of assault in the first degree, one count of assault in the third degree, four counts of assault in the fourth degree and one count of operating a motor vehicle while under the influence of alcohol.

On appeal, Appellant argued the results of the blood and urine tests should have been suppressed because too much time elapsed between the accident and the collection of the blood sample. Further, Appellant contended the admission of the results of the urine test was error as driving under the influence in Kentucky is measured through breath or blood, not urine. Appellant also argued that the trial court impermissibly allowed the Commonwealth to use the various tests to extrapolate Appellant's blood alcohol level at the time of the accident.

The Court declined to adopt a bright line rule with respect to when the lapse of time between driving and testing for alcohol intoxication becomes so great as to prevent a rational trier of fact from determining guilt based thereon. The Court noted the record did not indicate any reason to distrust the test results and that the hospital staff closely monitored Appellant from the moment he entered the emergency room. Concerning the admissibility of the results of the urinalysis, the Court held that the failure of KRS 189A.005(1) to mention urine does not affect the admissibility of urine sample evidence to prove guilt under KRS 189A.010(1)(b). Lastly, the Court held that although extrapolation evidence is not required for the Commonwealth to make a prima facie case of a violation of KRS 189A.010(1)(a), nothing precludes the Commonwealth or the defendant from using extrapolation evidence to assist the trier of fact in its determinations.

Appellant contended the results of the hospital's test of his blood serum should have been excluded, as it did not accurately depict his level of intoxication at the time of either the testing or the accident. Blood serum occurs when the solid cellular material in whole blood is precipitated out, leaving only the liquid portion called serum. When this serum is tested for alcohol a higher BAC often results, as more alcohol is concentrated in the liquid serum. The Court held there was no abuse of discretion in admitting evidence that made a determination of Appellant's intoxication more probable than not and that Appellant's concerns go to the weight of the evidence, not its admissibility. Both sides presented expert testimony as to the BAC amplification in blood serum; hence, the jury could evaluate the results and determine what weight to give the serum. The Court did note that a different result might be reached if no evidence was presented to the jury on the conversion rates between blood serum and whole blood.

Appellant argued the trial court erred in its instructions on third-degree assault. Pursuant to KRS 508.025(1)(a), a person is guilty of third-degree assault when he recklessly, with a deadly weapon or a dangerous instrument, or intentionally causes, or attempts to cause, physical injury to… a state, county, city, or federal peace officer. The offense is identical to fourth-degree assault, KRS 508.030, except that the victim's status as a peace officer enhances the offense from a Class A misdemeanor to a Class D felony. The statute does not recite a culpable mental state with respect to the enhancing element (the status of the victim as a peace officer). Appellant argued the third-degree instructions should have required the jury to find him guilty of that offense if he recklessly caused physical injury to the officers while they were acting in the course of their official duties and if he knew they were so acting at the time of the offense. At trial, the jury was instructed to find Appellant guilty of third-degree assault if he recklessly caused physical injury to the officers **while** they were acting in the line of duty. The Court reversed Appellant's conviction of third-degree assault, holding the jury must be instructed as an element of third-degree assault that Appellant can be convicted only if he knew at the time of the assault the victim was a peace officer.

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Crowe v. Commonwealth
____S.W.3d____(2/22/01)

Leisha Crowe was found dead inside her own vehicle which was submerged in the Barren River. The victim's husband was indicted by a Warren County Grand Jury for her murder. The Commonwealth's theory of the case was that Leisha informed Appellant she intended to divorce him and that Appellant killed her and attempted to dispose of her body.

At trial, two co-workers of the victim testified the victim had told them within days of her death that she intended to divorce Appellant. The Commonwealth also presented the testimonies of two local attorneys, Kelly Thompson and Nancy Roberts. Thompson testified that approximately seven months prior to the murder, the victim came to his office and talked with him about the possibility of divorce.

Roberts testified that approximately three weeks before the murder, her secretary told her a person identifying herself as Leisha Crowe had telephoned the office to discuss obtaining a divorce. The secretary did not know Leisha Crowe to recognize her voice and had no knowledge if it was she who called.

The Supreme Court held the evidence that the victim wanted a divorce and intended to inform her husband of that fact was within the scope of KRE 803(3) [state-of- mind exception]. Thus, the testimony of the two co-workers and Thompson was admissible. However, even though the statements attributed to the caller by Robert's secretary fell within the scope of KRE 803, Robert's testimony was inadmissible because there was no authentication that the person who made the statement was the victim and her testimony constituted double hearsay.

The Court pointed out KRE 901(b)(6) provides a telephone conversation is properly authenticated when an **outgoing** call is made to a number assigned at the time by the telephone company to a particular place and if there is self-identification. Here, KRE 901(b)(6) did not apply because the telephone call was incoming, not outgoing. Further, since the secretary did not know Leisha Crowe, KRE 901(b)(5) [voice identification authentication] was inapplicable.

The Court stated even if the call to Robert's office had been properly authenticated, Robert's testimony as to what her secretary told her about what the caller had told the secretary was double hearsay, and there is no hearsay exception which would allow Roberts to testify to what the secretary told her. Reversed and remanded.

The dissent agreed the trial court erroneously permitted Roberts to testify to inadmissible hearsay, but found the evidence cumulative and harmless.

Holloman v. Commonwealth
___S.W.3d___(2/22/01)

Reversed and remanded. Holloman was convicted of the rape, sodomy and sexual abuse of an eight-year-old girl and received a life sentence. Prior to trial, Appellant had moved the trial court to suppress his confession. After a hearing, the motion was overruled. At trial, the Appellant sought to introduce expert testimony about his mental retardation and how that conviction affects his ability to understand and to communicate.

The trial court refused to let in the expert testimony for three reasons. First, the court believed the opinion testimony would go to the ultimate issue of voluntariness of the confession. Second, the court believed the defense was using the expert testimony as a subterfuge to get into evidence mental retardation as a sympathy factor and third, the trial judge did not believe the defendant had given appropriate notice it intended to offer such testimony.

The Supreme Court held the Due Process Clause and the Confrontation Clause of the Sixth Amendment entitled a criminal defendant to a meaningful opportunity to present a complete defense, entirely independent of the determination of the voluntarienss of his confession. Even though the issue of voluntariness of his confession had been ruled upon at the suppression hearing, the defendant had the constitutional right to a fair opportunity to persuade the jury that his statements were not credible and should not be believed.

Notorn v. Commonwealth
____S.W.3d____(2/2/01)

Affirmed. Norton was convicted of second-degree burglary and of being a persistent felony offender. On appeal, Appellant argued the trial court committed reversible error in permitting the prosecutor to mention sentencing information during the guilt/innocence phase of the trial.

The prosecutor mentioned sentencing issues during voir dire when he questioned the prospective jurors on their ability to follow the law and consider any potential punishment in the authorized penalty range. The prosecutor also discussed sentencing during guilt phase closing argument in response to defense counsel's statements during voir dire. (Defense counsel had repeatedly asked jurors if they would "max out" the defendant because he had admitted to attempting to burglarize the victim's home).

The Supreme Court held that sentencing issues must not be raised prior to the penalty phase of trial as a means to impermissibly influence the jury to convict based on the desired penalty rather than on the elements of each given offense. However, the Court also stated there are legitimate and ap-

propriate reasons to inform a venire of the range of penalties that it may be called upon to impose as well as rational and logical reasons to discuss the potential penalties in the context of a defendant's possible motivations during closing argument. The Court overruled *Carter v. Commonwealth*, 782 S.W.2d 597 (1990) insofar as it holds that sentencing information is always inadmissible during the guilt/innocence phase of the trial.

The Court also addressed the issue of the trial court's order of a contempt conviction to run consecutively to Appellant's burglary sentence. The Court held that KRS 532.110(1)(a) requirement of concurrent sentencing does not apply to terms imposed as punishment for contempt of court.

Matthews v. Commonwealth
___S.W.3d___(2/22/01)

Reversed in part. Appellant was convicted of several drunk driving related offenses. At trial, the Commonwealth was unable to produce the nurse that drew Appellant's blood. The Commonwealth relied on an officer that had observed the nurse draw the blood and also on the testimony of a chemist, who analyzed the blood sample. The Commonwealth attempted to introduce the chemist's report that the blood sample read .25 grams of ethyl alcohol per 100 milliliters of blood. Appellant objected to the Commonwealth's lack of a proper foundation for the reading, namely the credentials of the nurse who drew the blood. KRS 189A.103(6) authorizes blood to be drawn by a physician, registered nurse, phlebotomist, medical technician or medical technologist.

The Court held KRS 189A.103 and the regulations concerning the credentials of the individual drawing the blood should be read as giving a presumption of regularity. It is presumed the individuals listed in the statute will perform the procedures properly, however that list is not exhaustive.

The Court also held wanton endangerment is not a lesser-included offense of misdemeanor assault because each offense requires proof of an element which the other does not. Assault in the fourth degree requires a finding of physical injury, whereas wanton endangerment does not. Wanton endangerment requires conduct which creates a substantial danger of death or serious physical injury to another whereas fourth degree assault does not.

The Court reversed in part on the grounds there was insufficient evidence to convict Appellant of first-degree wanton endangerment of victim Lucinda Riden. Riden was allegedly in one of the vehicles involved in the collision with Appellant. The Commonwealth failed to ever mention Riden's name or connect her to the vehicle.

Commonwealth v. Ingram
___S.W.3d___(3/22/01)

Certification of Law. Ingram was charged with loitering and was arraigned in Jefferson District Court by use of the video arraignment system. Subsequently, he filed a motion seeking to discontinue the use of video arraignment in Jefferson County. The Jefferson District Court issued an order holding video arraignment systems violated the Jefferson District Court rules as well as a defendant's due process rights.

RCr 8.02 states, in relevant part, "Arraignment shall be conducted in open court and shall consist of reading or stating to the defendant the substance of the charge and calling upon the defendant to plead in response to it."

RCr 8.28 provides that "The defendant shall be present at the arraignment, at every critical stage of the trial including the impaneling of the jury and the return of the verdict and the imposition of the sentence." The Supreme Court held the language of RCr 8.02 and RCr 8.28, particularly when construed in light of RCr 1.04(3) is broad enough to accommodate the use of video proceedings at arraignment.

The Court also held video arraignment did not violate local Jefferson Court Rule 6.05 which required that at all arraignments the defendant be given in-hand notice of the next scheduled court date. To comply with this rule, the court date was sent from court to a printer located near the defendant.

Finally, the Court held video arraignment did not violate a defendant's due process as the arraignment of an accused via closed circuit television is constitutionally adequate when the procedure is functionally equivalent to live in-person arraignment.

Matheny v. Commonwealth
____S.W.3d___(2/22/01)

Remanded for new sentencing hearing. Appellant entered into a plea agreement with the Commonwealth. According to the terms of the plea agreement, the Commonwealth was to dismiss 32 counts against Appellant, leaving two counts which were to be amended to first-degree sexual abuse. The Commonwealth was to recommend a sentence of three years on each count, that the sentences be run concurrently and that Appellant be probated pursuant to conditions that were to be set forth at sentencing.

Pursuant to the plea agreement, Appellant withdrew his former plea of not guilty and entered a plea of guilty to two counts of first-degree sexual abuse. At sentencing, the Commonwealth recommended probation conditioned on a requirement that Appellant undergo counseling. However, before

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the trial court could pronounce judgment, one of the victims asked to be heard. The victim stated she was not satisfied with probation and felt Appellant should serve some time. The Commonwealth withdrew its offer under the plea agreement.

The Supreme Court held the trial court erred in allowing the Commonwealth to withdraw its offer. If a plea offer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his detriment in reliance on the offer, then the agreement becomes binding and enforceable. A crime victim's right to make his or her feelings, opinions, and experiences known to the trial court prior to sentencing has no bearing on the Commonwealth's obligation to adhere to the terms of a completed plea agreement. The Court remanded the case for a new sentencing hearing, ordering the hearing to be held on two counts of first-degree sexual abuse to which Appellant pled guilty. The Supreme Court ordered the Commonwealth to make its sentencing recommendation according to the original plea agreement.

Gourley v. Commonwealth, Ky.App.
___S.W.3d___(2/2/01)

Appellant was arrested for bank robbery. He was seventeen years of age at the time of the robbery. After a transfer hearing, Appellant was transferred to the circuit court to be tried as a youthful offender. After a trial by jury, Appellant was found guilty of first degree robbery and the jury recommended a sentence of eleven years imprisonment. The trial court entered an order directing the Division of Probation and Parole to prepare a pre-sentence investigation on Appellant.

Appellant objected to the preparation of his PSI report by the Division of Probation and Parole, claiming that KRS 640.030 mandates that the Department of Juvenile Justice prepare the PSI report in a case involving a youthful offender. The Court held that while a youthful offender is subject to the same penalty as an adult, he is nonetheless eligible for the ameliorative sentencing procedures authorized in KRS 640.030. Thus, the Court ordered the trial court to render a sentence in accordance with the sentencing procedures for youthful offenders set forth in KRS 640.030, including the preparation of a PSI report by the Department of Juvenile Justice.

Fletcher v. Commonwealth, Ky. App.
___S.W.3d___(3/2/01)

Kelly Click was home alone and talking to his girlfriend on the phone when he heard someone outside his house. Click looked outside and saw a man, later determined to be Appellant Fletcher, yelling and screaming. Click then heard a knocking at his door. Click looked out the door's window and saw Fletcher standing there. Fletcher told Click to open the door, and he did. Click next remembers waking up in the driveway. Fletcher was convicted of burglary in the second degree and assault in the fourth degree. On appeal, Fletcher claimed the Commonwealth had failed to prove he had unlawfully entered Click's house. The critical factual question was whether Fletcher's hand unlawfully entered Click's dwelling. At trial, Click testified there was no way he could have been hit in the face without Fletcher's hand entering the house through the open doorway. However, Fletcher argued the Commonwealth's evidence was insufficient to prove the elements of burglary because he claims he did not enter Click's house unlawfully, that since Click opened the door after Fletcher told him to, Click's opening of the door constituted an invitation to Fletcher to enter.

The Court held the opening of the door by Click did not extend an implicit invitation for Fletcher to enter. The building was a home, not a store or public park, and Click did not know Fletcher. Further, there was no evidence that Click made any kind of utterance, gesture or movement that could have reasonably constitute an invitation, either implicit or explicit, to Fletcher to enter the home.

Donovan v. Commonwealth, Ky.App.
___S.W.3d___(2/9/01)

Affirmed. Donovan was appointed a public defender by the trial court. At trial, Donovan was acquitted of all charges. After the verdict was rendered, the trial court imposed a recoupment fee on Donovan. Donovan appealed, contending the recoupment fee on a defendant who is acquitted of all charges violated the right to counsel, the Due Process Clause and the Equal Protection Clause.

The Court held a recoupment fee may only be found unconstitutional if it arbitrarily discriminates against indigents or encourages the indigent person to do without counsel. In Kentucky, all defendants are treated equally and those who are capable of paying the recoupment fee may have it assessed against them. The fee is assessed on the basis of ability to pay and has no relationship to the guilt or innocence of the defendant. Further, the fee is only assessed after the representation is complete and only where the defendant can afford to pay a percentage of the defense costs on reasonable terms. The fee is not a penalty, but is merely a partial recoupment of the costs expended by the state to protect those in need. ■

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6th Circuit Review

by Emily Holt

Emily Holt

U.S. v. Harris
237 F.3d 585 (6th Cir. 1/10/01)

State Court Convictions Used to Increase Federal Sentence

In determining a federal criminal defendant's sentence under the sentencing guidelines, the district court must assign points based on the offender's past criminal history. Harris had three prior convictions, two of which were Tennessee state convictions. The state court had sentenced Harris to concurrent 3-year prison terms. However, Harris had been administratively paroled by the Tennessee Dept. of Corrections after 18 days imprisonment.

Federal sentencing guidelines provide "if part of a sentence of imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended." U.S.S.G. § 4A1.2(b)(2). Harris argues the district court should have only counted only 18 days, not 3 years.

The 6th Circuit looks to Tennessee state law to conclude that Mr. Harris' release from prison was not a court-ordered suspended sentence, but rather correctional parole. During his period of parole, his sentence had not expired, and he was still in the custody of the penal authorities.

Simpson v. Jones
238 F.3d 399 (6th Cir. 12/5/00 designated "unpublished decision"; 1/11/01 published)

State Procedural Default Forecloses Federal Habeas Review

Simpson was convicted in Michigan state court of felony murder and robbery and sentenced to life in prison without the possibility of parole. On federal habeas review, the district court ruled that the majority of his claims were barred by the doctrine of procedural default based on Michigan's procedural rule MCR 6.508(D). If a petitioner has procedurally defaulted a claim in state court, the default carries over to the federal court and precludes federal habeas review. However, the last state court rendering judgment must have based its judgment on the procedural default. "A procedural default analysis, then, is two-fold: the federal court must determine if a petitioner failed to comply with a state procedural rule; and it also must analyze whether the state court based its decision on the state procedural rule."

In the case at bar, the Michigan Supreme Court did base its decision denying relief on the state procedural ground. Federal habeas review is thus barred. Further there is no requirement that the state court "clearly and expressly" states that its judgment was based on a state procedural review. This is only a requirement when a state court judgment rests primarily on federal law or is interwoven with federal law. *Coe v. Bell*, 161 F.3d 320, 329-330 (6th Cir. 1998).

U.S. v. Murphy
2001 US App LEXIS 535 (6th Cir. 1/16/01)

"Other Crimes" Evidence: Reference to Transaction with Confidential Informant May Be Barred

Murphy argues that the trial court erred by admitting "other crimes" evidence in violation of FRE 404(b), which is substantially similar to KRE 404(b). Specifically Murphy objects to (1) the government's reference in opening statements to Murphy selling drugs to someone else on a prior occasion and (2) the government's calling of a rebuttal witness to testify that he had engaged in a prior drug transaction with Murphy. Because Murphy failed to object on 404(b) grounds to the opening statement reference, the court reviews the issue with the "plain error" standard and finds no error because the trial court gave a cautionary instruction. However, in *dicta*, the 6th Circuit rejects the prosecution's contention that the reference to the transaction between the confidential informant and Murphy was not a reference to a prior bad act—"the rule of evidence concerning prior misconduct of the defendant relates not only to prior crimes, but to any conduct of the defendant which may bear adversely on the jury's judgment of his character."

"Other Crimes" Evidence: Appropriate Analysis by Trial Court

As to the rebuttal witness, the trial court finds that the defense attorney "dropped the ball" when he failed to ask the court to undertake 404(b) analysis when it overruled his objection. The 6th Circuit explains that the proper procedure is for the government to be required to identify the specific purpose for which it proposes to offer the evidence: "the government's purpose in introducing the evidence must be

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to prove a fact that the defendant has placed, or conceivably will place, in issue, or a fact that the statutory elements obligate the government to prove. . . the district court must [then] determine whether the identified purpose. . . is 'material'; that is, whether it is 'in issue' in the case. If the court finds it is, the court must then determine, before admitting the other acts evidence, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under Rule 403. If the evidence satisfies Rule 403, then, after receiving the evidence, the district court must 'clearly, simply, and correctly' instruct the jury as to the specific purpose for which they may consider the evidence." *U.S. v. Merriweather*, 78 F.3d 1070, 1076-1077 (6th Cir. 1996). While the district court may have failed to properly analyze the "other acts" evidence in Murphy's case, the error was harmless in light of the overwhelming evidence.

U.S. v. Boucha
236 F.3d 768 (1/17/01)

"Carjacking": Proximity of Victim to Vehicle

Boucha robbed banks using a firearm. During the robberies, he would demand keys to a nearby automobile from an employee and then use the vehicle as a getaway car. The victim was never forced to leave the building or ride with him. His sentence was enhanced pursuant to a carjacking enhancement. Boucha challenged this enhancement, arguing his conduct did not constitute carjacking.

The sentencing guidelines define "carjacking" as "the taking or attempted taking of a motor vehicle from the person or the presence of another by force and violence or by intimidation." Boucha specifically objects that he did not take the cars from the "person or presence" of the victims.

Because the language of the enhancement mirrors language of the federal carjacking statute, the court looks to other circuits' interpretation of "person or presence" in the context of that statute. In the 1st, 3rd, 5th, 9th, 10th, and 11th circuits, courts have found carjacking violations when the offender took keys from a victim some distance away from the car.

The Court concludes that a carjacking did occur in the case at bar and joins the majority of the circuits in holding "property is in the presence of a person if it so within his reach, inspection, observation, or control, that he could if not overcome by violence or prevented by fear, retain possession of it. . . carjacking [is] applicable to defendants who use force to rob a person of his car keys when that person's car is nearby." The court further states "presence, thus defined, requires a significant degree of nearness without mandating that the property be within easy touch; it must be accessible."

U.S. v. Carter
236 F.3d 777 (6th Cir. 1/18/01)

Prosecutorial Misconduct: Misstatement of Evidence and Calling Defense Counsel a Liar

In this case, the 6th Circuit reverses Carter's conviction for armed bank robbery because of prosecutorial misconduct.

In October, 1996, a black man robbed the Community First Bank of Hartsville, Tn.. He came in to the bank and demanded money from bank teller Terri Halliburton. Carter was eventually arrested. At his trial, Ms. Halliburton was one of the prosecution's key witnesses. During direct examination she identified Carter as the bank robber. However on cross, she stated that 2 days after the robbery she saw a news clip on a robbery suspect that showed a picture of another black man, Terry Johnson, but identified the pictured suspect as Carter. She called police chief Scruggs and told him she had just seen the man who robbed her bank. Before seeing the news clip, Ms. Halliburton had not viewed any sort of photo spread of potential suspects. It was not until September 1998, a few months before trial, that she was asked to look at a photo spread. She declined because she was afraid "that might confuse" her. Halliburton explained that when she arrived to testify she was still under the impression that she would be identifying the man she saw on the news clip—Terry Johnson. She changed her testimony to identify Carter as the robber only after Agent Whitten, who was sitting at the prosecution's table at trial, told her "it was the right name, Roquel Carter, but the wrong face" on the news clip.

Defense counsel pointed out in closing argument the changes Halliburton made in her identification testimony. The prosecutor then made his rebuttal argument: "Ladies and gentlemen, I am going to submit to you—will try and yell and scream I submit to you, you have heard one **tremendous colossal lie**. Terri Lynn Halliburton Presley testified she did——remember what she said [?] She did not say, 'You have the right guy but the wrong face.' And she never said anybody for the Government told her that. Remember what her answer was, she said, 'I was told to give an honest answer.' The only person who has ever said she said that is Doug Thoresen [defense counsel]. She never said that. **That is a lie, a bold fabrication**. She said, 'I was told that the man in the picture is not Roquel Carter.' She didn't say, 'I was told you have got the wrong guy.' On that question, she answered, 'I was told to be honest." [emphasis in opinion]

Further the prosecutor said, "**And it is an absolutely whole lie that she was told that she had the wrong guy on the bank robbery**. She was told to give her honest answer, period. Don't let them sneak that one over on you. Evaluate the case, evaluate what it is, do your job. But don't let that curve sneak across the plate. **It's a lie**." [emphasis in opinion]

Defense counsel never objected during the argument. On the second day of deliberations, the jury sent a question to the judge asking if it could base its verdict solely on the circumstantial evidence, not the eyewitness identification. The trial court responded "you can base a verdict upon circumstantial evidence but only if that circumstantial evidence convinces you beyond a reasonable doubt that the Defendant is guilty of the crime charged in the indictment." The jury returned with a guilty verdict about an hour later. Defense counsel asked the judge to poll the jury to find out if they discounted the eyewitness testimony and based the verdict on circumstantial evidence. The trial court did not poll the jury, but instead asked the foreperson if some jurors based their verdict only on circumstantial evidence and if some were satisfied with the eyewitness identifications. The foreperson said yes.

Because defense counsel failed to object, the court applies a plain error analysis and determines reversal is required. "While counsel has the freedom at trial to argue reasonable inferences from the evidence, counsel cannot misstate evidence or make personal attacks on opposing counsel." The prosecutor in this case misstated evidence when he told the jury that Ms. Halliburton did not admit to being told she had made a mistake in identifying the bank robber. Actually she told the jury three times that prior to her testimony Agent Whitten told her she had made a mistake in her identification. The prosecutor also made a prohibited personal attack on opposing counsel when he said defense counsel lied four times.

***Carroll* Test**

The prosecutor's misconduct affected Carter's substantial right and warrant reversal under the *Carroll* test. *U.S. v. Carroll*, 26 F.3d 1380 (6th Cir. 1994). Under *Carroll*, a reviewing court must determine whether the prosecutor's improper remarks were flagrant thus requiring reversal. Four factors are to be focused on: (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks or conduct was isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong.

The prosecutor's statements were likely to prejudice Carter for a couple of reasons. First, "a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." *Washington v. Hofbauer*, 228 F.3d 689, 700 (6th Cir. 2000). Jurors inherently place great confidence in what prosecutors tell them. Second, the evidence that the prosecutor misled the jurors about was central to the prosecution case. Halliburton was the only person at the bank who could identify Carter.
The 6th Circuit notes that although a curative instruction may alleviate any misconduct, any instructions given in the case at bar were insufficient. Importantly the 6th Circuit rejects the notion that the instruction "objections or arguments made by the lawyers are not evidence in the case," given with the guilt phase instructions, is sufficient to cure the misconduct.

The court determines that the prosecutor's comments were prejudicial statements that infected the entire trial. The comments were the last ones heard by the jury before deliberations. The fact that the comments were made only during closing arguments does not change the prejudice. "Even a single misstep on the part of the prosecutor may be so destructive of the right of the defendant to a fair trial that reversal must follow." *U.S. v. Smith*, 500 F.2d 293, 297 (6th Cir. 1974)[In this case the prosecutor made other improper comments. Specifically during *voir dire* he asked the jury if they remembered a shoot-out in October 1996 in Talladega that Carter had been involved in.] Further, the court notes that defense counsel did not "invite" the improper statements during closing argument.

As to the third *Carroll* factor, the prosecutor knowingly and deliberately placed his comments before the jury. The prosecutor should have objected to what he felt was defense counsel's mischaracterization of the evidence rather than make offensive comments. *U.S. v. Young*, 470 U.S. 1, 13, 84 L.Ed.2d 1, 105 S.Ct. 1038 (1985).

The 6th Circuit finds this tactic particularly objectionable when the prosecutor told the court during oral argument that he actually held defense counsel in high regard and had known him for many years. The number of times the prosecutor made the comments also illustrates the comments were not accidental.

Finally, the court concludes that "while there arguably was sufficient circumstantial evidence presented at trial to support the jury's guilty verdict, this evidence was not so strong as to overcome the improper and inflammatory comments made by the prosecutor. Although numerous pieces of circumstantial evidence presented at trial seem to suggest that Carter may have robbed the Hartsville Bank, we do not consider the cumulative weight of this evidence to be overwhelming, especially in light of the evidence suggesting that Terry Johnson may have been the robber, not Carter." Thus, the fact that the prosecution's case is strong does not diminish the harmfulness of the error.

U.S. v. Burke
237 F.3d 741 (6th Cir. 1/19/01)

"Downward Departure" Under Federal Sentencing Guidelines

Ms. Burke robbed two banks in Kentucky. She was convicted in a bench trial of two counts of armed bank robbery and for carrying a firearm in relation to a crime of violence. At

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final sentencing, the district court departed downward from the sentencing guidelines for armed bank robbery based on a finding of diminished capacity and ordered restitution and probation. This downward departure was provided for under the sentencing guidelines. The court concluded, however, that it had no discretion to depart downward on the basis of diminished capacity from the firearm offense and sentenced Ms. Burke to the minimum sentence of 5 years imprisonment. Judge Hood, E.D. Kentucky, "directed" Ms. Burke's attorney to "take it up to Cincinnati and let them tell me I'm right."

The Sixth Circuit ultimately concludes that Judge Hood is correct. A sentencing court may not depart downward below the statutory minimum sentence unless the government has made a motion for downward departure on the basis of substantial assistance. In asserting this principle, the Sixth Circuit joins the 3rd, 4th, 7th, 8th, 9th and 11th Circuits. In the absence of a substantial assistance exception, or any other exceptions created by Congress to a specific statutory provision, "defendants may not be sentenced, by means of a downward departure, to a term of imprisonment or other punishment below the minimum imposed by the statute under which they were convicted."

Doan v. Brigano
237 F.3d 722 (6th Cir. 1/19/01)

Experiments by Jurors

Doan was convicted of murder and child endangerment after a baby in his care died of bodily trauma. After conviction, but before sentencing, his defense team interviewed the jurors. "Juror A" told the jurors that after hearing Doan testify that he could not see any bruises on the baby's body because of the darkness of the room she went home and did an "experiment." She put lipstick on her arm to simulate a bruise and turned off the lights. She could see the lipstick and determined Doan lied on the stand. During deliberations she told the other jurors of her experiment and her conclusion. Juror A signed a sworn affidavit as to her conduct during the trial.

The trial court overruled Doan's motion for a new trial, based partly on the juror misconduct claim, at final sentencing. The Ohio Court of Appeals affirmed his conviction, acknowledging that while the juror's misconduct was improper and prejudicial, the Court could not consider the juror affidavit pursuant to Ohio Evid. R. 606(b). On federal habeas review, the district court denied Doan's petition on the grounds that all claims except for the juror misconduct claim were procedurally barred, and that the juror misconduct claim was barred because Ohio state courts used an adequate and independent state ground to deny relief. The 6th Circuit limited its review to the juror misconduct issue.

The district court incorrectly determined that Ohio Evid. R. 606(b) was an adequate and independent state ground. For the rule of law to be adequate, it must be "sufficient by itself to support the judgment, regardless of whether the federal law issue is affirmed or reversed." Doan argued that the state rule violated his U.S. constitutional rights. "State law obviously is not adequate to support the result when there is a claim that the state law itself violates the Constitution. . . To hold otherwise would allow a state and its courts to evade the requirements of the United States Constitution any time they chose to apply a state procedural rule, regardless of whether that state rule complied with federal constitutional guarantees."

On appeal to the Ohio Court of Appeals, Doan argued that the juror misconduct violated his sixth amendment right to have a fair and impartial jury determine its verdict solely on evidence presented at trial. The Court did not address this argument, instead denying relief on the basis of Ohio Evid. R. 606(b) that provides that before a juror can testify as to extraneous influence, there must first be independent evidence from a source with firsthand knowledge other than the jurors themselves. Juror A's affidavit was inadmissible since there was no independent evidence of misconduct or improper influence. [Ohio Evid. R. 606(b) is a codification of the common law "aliunde" rule. FRE 606(b) does not codify the aliunde rule- it would have allowed the affidavit to common in irregardless of any third-party evidence. KRE 606(b) does not contain any such provision- it merely prohibits a juror from testifying before a jury of which she is a member.]

6th Amendment Right to a Fair Trial Violated by Juror Experiment

The 6th Circuit holds that the Ohio Court of Appeals' decision to apply its rule of evidence in spite of Doan's sixth amendment claim is "contrary to" clearly established Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000). Doan's right to a fair trial was violated when the jury considered Juror A's experiment: "In the Constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-473, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965)(citations omitted). Juror A essentially became a witness whom the defense could not confront and possibly discredit through cross-exam or the presentation of alternative evidence. Ohio Evid. R. 606(b) denies the Ohio courts the opportunity to consider juror misconduct and thus denied Doan his federal constitutional right to confront and cross-examine the witnesses against him.

The Court stresses that it is not reviewing "private, internal deliberations of the jury" and acknowledges the U.S. Supreme Court's holding in *Tanner v. U.S.*, 483 U.S. 107, 119-121, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) that generally courts should avoid considering jury deliberations. In this case, Juror A was essentially acting as an expert witness when she conducted an out-of-court experiment and told the other jurors about her conclusions. This is not an examination of "internal factors" affecting the jury.

Harmless Error

While the 6th Circuit concludes that the juror misconduct in this case amounted to a constitutional error, it ultimately decides that it was harmless error. The error must have had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). At trial, the prosecution played taped confessions of Doan admitting to harming the baby. While Doan testified at trial that he lied in the taped confessions, other evidence presented at trial, including impeachment evidence and the medical examiner's testimony, supported the substance of the taped confessions. Further Doan "had a difficult time keeping his story straight." Because the juror misconduct did not affect or influence the jury's verdict, habeas relief is denied.

U.S. v. Johnson
237 F.3d 751 (6th Cir. 1/25/01)

Writ of Error *Coram Nobis*

A writ of error *coram nobis* was used at common law to correct "fundamental errors" in criminal and civil cases. It is now only used in the criminal law context. It may be used to vacate a federal conviction after the petitioner has served his sentence and relief under § 2255 is unavailable. *U.S. v. Morgan*, 346 U.S. 502, 98 L.Ed. 248, 74 S.Ct. 247 (1954).

There is a split in the circuits as to whether the federal civil or criminal rules apply to writs of error *coram nobis*. The 6th Circuit joins the majority of circuits that apply civil rules to writs of error *coram nobis*, primarily because of their similarity to § 2255 motions. "Although a *coram nobis* motion is a step in a criminal proceeding, [it] is, at the same time, civil in nature and subject to the civil rules of procedure." *U.S. v. Balistrieri*, 606 F.2d 216, 221 (7th Cir. 1979). Thus, the 60-day appeal period provided for in Fed.R.App.P. 4(a) shall apply to writs of error *coram nobis.*

The 6th Circuit ultimately rejects Johnson's petition because he is in federal custody and a prisoner in custody is barred from seeking a writ of error *coram nobis*.

U.S. v. Harris & Gaines
238 F.3d 777 (6th Cir. 1/30/01)

Failure to Give Notice of Facts in Indictment is Not Violation of *Apprendi*

While this case involves an interpretation of federal sentencing law and is primarily inapplicable to the state court practitioner, it includes powerful language in the dissent that state court attorneys may which to cite to.

Harris and Gaines killed a soldier when attempting to rob a convenience store on the grounds of the army base at Fort Campbell, Ky. The indictment failed to specify whether they were indicted for first or second-degree murder. As a result, the district court ruled that the defendants could only be charged with second-degree murder. The defendants plead guilty. However, the district court then held that the defendants could be sentenced in accordance with first-degree murder sentencing guidelines because of a cross-reference in the guidelines. Harris & Gaines received a sentence for first-degree murder. The 6th Circuit held there was no error and that such a sentence was acceptable under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), since it did not exceed the statutory maximum for the crime charged in the indictment.

Powerful Dissent by Judge Merritt

In a strong dissent, Judge Merrit states "the fundamental basis of our decision in the instant case [is] clearly contrary to the spirit of *Apprendi*, which says that factual issues having a significant impact on the defendant's sentence should be charged in the indictment and proved to a jury beyond a reasonable doubt. The *Apprendi* approach seems to me to disfavor the current judicial and prosecutorial practice of not giving notice by indictment of the real crime at issue and of leaving most of the more salient factual disputes for the sentencing hearing, where the burden of proof is the less rigorous 'preponderance of the evidence' standard and the hearsay rules do not apply. Following the logic of *Apprendi*, the government should not have been able to cure its charging error simply by convincing a judge outside the normal rules of evidence that the preponderance of the evidence indicated that Harris and Gaines committed first degree murder."

Staley v. Jones
2001 US App LEXIS 1517 (6th Cir. 2/5/01)

Michigan Stalking Statute

This habeas action involves a challenge to Michigan's stalking law. The federal district court granted Staley's petition for writ of habeas on the basis that the statute was overbroad in violation of the first amendment because the exclusions for "constitutionally protected activity" and "conduct that serves a legitimate purpose" were too limited. The state appealed.

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The challenged law defines "stalking" as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested." Mich. Comp. Laws Ann. § 750.411i(e). "Harassment" is defined as "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress." Excluded from the definition of "harassment" is "constitutionally protected activity or conduct that serves a legitimate purpose." § 750.411i(d).

Staley's conviction stems from his interactions with an ex-girlfriend for a couple of months in 1993. A jury convicted him of stalking and he plead guilty to being a habitual offender, fourth offense. He was sentenced to life imprisonment. He appealed, arguing (1) the stalking statute was unconstitutional and (2) his sentence was disproportionate. The Michigan Court of Appeals rejected the constitutional argument, but remanded his case to the trial court for re-sentencing.

Overbreadth Doctrine

The federal district court found the stalking statute to be overbroad. An individual may challenge a statute on its face if it infringes on first amendment rights. The district court determined that facial analysis was necessary in this case because (1) there was no *mens rea* requirement; (2) violation resulted in substantial criminal penalties; and (3) recent legal precedent established that such challenges were appropriate.

Looking at Michigan Court of Appeals precedent, the federal district court concluded that the "constitutionally protected activity or conduct that serves a legitimate purpose" only includes "labor picketing or other organized protests." *People v. White*, 536 N.W.2d 876 (Mich.Ct.App. 1995). The court then concluded "if only labor picketing and other organized protests are explicitly excluded from the definition of harassment, the statute is at odds with the first amendment." *Staley v. Jones*, 108 F.Supp.2d 777, 787 (W.D. Mich. 2000). It was especially concerned with three scenarios in which 1st Amendment rights would be violated: (1) "rights of the press to investigate issues of public importance"- a reporter could be prosecuted under the statute when legitimately investigating a story (2) "commercial speech"- a telemarketer or salesman could be prosecuted and (3) "the rights of ordinary citizens to redress political or legal grievances"- a citizen calling a congressman or making repeated court filings with a clerk. The court declared the statute unconstitutional.

Habeas Review of Overbreadth Doctrine is Appropriate

The 6th Circuit first considers whether habeas review of a facial overbreadth challenge is appropriate. The 6th Circuit rejects respondent's argument that *Stone v. Powell*, 428 U.S. 465, 49 L.Ed.2d 1067, 96 S.Ct. 3037 (1976), should be extended beyond the realm of the 4th amendment to also preclude habeas review of 1st amendment challenges. The court bases its decision on the fact that the overbreadth doctrine is prospective—"its purpose is to prevent the chilling of future protected expression"—and "occupies hallowed ground in our constitutional jurisprudence."

District Court Reversed: Stalking Statute Constitutional

The Court next considers respondent's assertion that the district court erroneously construed the state court's interpretations of the stalking statute when it held that only "labor picketing and other organized protests" were exempted from the definition of harassment. The 6th Circuit agrees, emphasizing it is clear that the *White* court meant those activities to be illustrative, not exhaustive. This misinterpretation, the court concludes, "improperly colored" the district court's analysis of the overbreadth issue.

The Court concludes the Michigan state court's determination that the stalking law was not overbroad was not an unreasonable application of U.S. Supreme Court precedent as it existed in 1995-1996. In *Broadrick v. Oklahoma*, 413 U.S. 601, 615-616, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973), the U.S. Supreme Court stated "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Further, overbreadth can be cured on a case-by-case basis. *Id.* The 6th Circuit concludes that the federal district court did not look to legal precedent in its analysis of the state court decision; rather it "conducted its own independent assessment of the state statute." The *White* court's application of *Broadrick*, the U.S. Supreme Court case on point, was not unreasonable.

U.S. v. Ramirez
2001 US App LEXIS 2325 (6th Cir. 2/16/01)

***Apprendi* Applied to Federal Drug Sentencing Scheme**

"A defendant's rights to notice by indictment of the crime charged, trial by jury, proof beyond a reasonable doubt, and confrontation of witnesses turn on whether particular conduct is categorized as an 'element of the offense' or as merely 'a sentencing factor.'" *quoting U.S. v. Castillo*, 530 U.S. 120, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000). In *Apprendi v. N.J.*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the court began to define the difference between an "element of the offense" and a "sentencing factor" when it held (1) that any fact that increases the maximum statutory penalty is an element of an offense, with the exception of prior conviction and (2) the legislature cannot characterize facts which increase the prescribed range of penalties as sentencing factors. In this case, the 6th Circuit examined how *Apprendi* applies to increases in penalties imposed by the federal drug statute.

Ramirez was indicted for conspiracy to distribute cocaine and attempt to possess cocaine with intent to distribute. The indictment failed to specify the amount of cocaine involved or any other facts regarding the crimes. A jury convicted Ramirez and the district court reluctantly imposed the mandatory minimum sentence of 20 years on Mr. Ramirez because he possessed 10 kg. of cocaine and had a prior drug conviction.

In *U.S. v. Flowal*, 234 F.3d 932 (6th Cir. 2000), the court held that "because the amount of drugs determined the appropriate statutory punishment, a jury should have determined the weight of the drugs beyond a reasonable doubt." In other words, "'the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed,' such as moving up the scale of mandatory minimum sentences, invokes the full range of constitutional protections required for 'elements of the crime.'"

The 6th Circuit's express holding is "aggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved."

Judge Siler Concurrence: *Apprendi* Not Applicable

Judge Siler writes a concurrence in which he states that he has joined the opinion because the outcome is required by *U.S. v. Flowal*, *supra* (a case that another panel decided). He, however, believes that *Apprendi* is not as far-reaching as this opinion would suggest. Specifically, he points to the majority opinion in *Apprendi* that specifically states that *McMillan v. Pa.*, 477 U.S. 79, 91 L.Ed.2d 67, 106 S.Ct. 2411 (1986), has not been overruled. *McMillan* involved a state statutory scheme in which persons convicted of certain felonies would be subject to a mandatory minimum penalty of 5 years imprisonment if the court found, by a preponderance of the evidence, that person possessed a firearm in the course of committing the felony. The Court found that such a scheme did not violate the Constitution. Further, Judge Siler notes the 5th and 8th Circuits have held that *Apprendi* is inapplicable to the determination of the quantity of drugs in order to trigger the statutory minimum sentence. ■

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CAPITAL CASE REVIEW

by Julia K. Pearson

The two cases from the Sixth Circuit are included for their educational value to capital post-conviction practitioners. *West v. Bell* is another case which illustrates the difficulty of next-friend practice. *Workman v. Bell* demonstrates that there is some notion that minimal due process guarantees exist in clemency proceedings.

***Shafer v. South Carolina*, 2001 U.S. LEXIS 2456 —S.Ct. — (decided March 20, 2001)**

Majority: Ginsburg (writing), Rehnquist, Stevens, O'Connor, Kennedy, Souter, Breyer
Minority: Scalia (writing), Thomas (writing)

The Supreme Court reexamined *Simmons v. South Carolina*, 512 U.S. 154 (1994) (when future dangerousness is an issue and the only sentencing alternatives are death and life without possibility of parole, due process requires that the jury be informed that the defendant is ineligible for parole) in light of the amended South Carolina capital sentencing statute. Under those amendments, if a jury fails to unanimously agree that a statutory aggravator is present, the trial judge must sentence the defendant to either life in prison or a mandatory minimum thirty-year sentence. If the jury is unanimous in finding a statutory aggravator, it then has two sentencing alternatives: death or life in prison without possibility of parole. 2001 U.S. LEXIS 2456 at *11.

Shafer was charged with the 1997 murder of a convenience store clerk in the course of an attempted robbery. In its instructions to the jury, the court twice stated that life in prison meant "until the death of the defendant." *Id*., at *15. After deliberating over three hours, the jury returned with two questions: whether there was a "remote chance for someone convicted of murder to become eligible for parole" and "under what conditions [he or she] would be eligible." Once again, the trial court informed the jury that life in prison meant just that and the jury should not consider parole eligibility or ineligibility in its decision-making. *Id*., at *16-17.

SOUTH CAROLINA SUPREME COURT'S ANALYSIS ERRONEOUS

On appeal, the South Carolina Supreme Court found *Simmons* inapplicable to the new sentencing scheme because there were three choices: death, LWOP and the mandatory minimum thirty years.

Justice Ginsburg noted that the state court was partially correct in that at the time the jury was instructed, Shafer faced the possibility of either of the three sentences because the jury had not yet acted as fact-finder and determined that a statutory aggravator existed, which would have removed sentencing discretion. *Id*., at *25. However, "when the jury en-

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deavors the moral judgment whether to impose the death penalty," parole eligibility becomes a concern. Thus, when future dangerousness is an issue under the new sentencing scheme, the jury must be instructed that life in prison means the defendant has no chance of parole. *Id*., at *26-27.

WAS THE JURY INFORMED ABOUT PAROLE ELIGIBILITY?

State attorneys argued that the jury was informed about parole ineligibility by defense counsel's argument that, if given life in prison, Shafer would "die in prison" and by the judge's instructions that life in prison meant life.

However, in the Supreme Court's view, discontinuation of parole eligibility for those persons accused of capital murder is a recent development, even in South Carolina, and is one many potential veniremembers may not be aware of, especially since the new law had only been in effect two years before Shafer's trial.

The Court also pointed out that the jury asked two questions about parole eligibility; at least some veniremembers had concerns about possible release. The trial court's answer that parole eligibility or ineligibility was not the jury's concern certainly could have led to all or part of the jury believing Shafer would be eligible for parole sometime in the future, but that for some reason, the jury could not be told when or how.

Justice Ginsburg's discussion of the jury's possible speculation regarding Shafer's parole eligibility causes one to wonder whether she has read findings from the National Jury Project.

FUTURE DANGEROUSNESS NOT RIPE FOR CONSIDERATION

At a hearing on the jury instructions, the prosecutor said that Shafer was not entitled to a *Simmons* instruction because the state had not argued future dangerousness. Shafer's counsel pointed out that the prosecution had introduced evidence of a "post arrest assault," post arrest rules violations at the jail and that Shafer was charged with assault on the jailer. The trial court stated that he would not instruct the jury on Shafer's parole eligibility, but that if the prosecutor argued future dangerousness in closing, he might change his mind. *Id*., at *12-13.

After closing arguments, counsel again requested a *Simmons* instruction because he believed the prosecutor had made future dangerousness an issue by repeating the words of a witness to the murder, who said, "They [Shafer and his two accomplices] might come back, they might come back." The judge denied the request, stating that although the prosecutor came close to the line, he did not cross it. *Id*., at *14.

Since the South Carolina Supreme Court made no rulings on the issue, the Supreme Court left for another day the future dangerousness question.

DISSENTS

Justice Scalia questioned the "authority of the federal courts to promulgate wise national rules of criminal procedure." *Id*., at *33. Justice Thomas believed that the judge's instructions and counsel's argument were enough for the jury to know that Shafer was not eligible for parole under either of its sentencing options, but wondered what would happen in the event the trial court became the sentencer. He also agreed with Justice Scalia. *Id*., at *36.

KENTUCKY IMPLICATIONS

This case highlights the importance of asking trial courts for instructions that a defendant sentenced to LWOP 25 will not be eligible to meet the Parole Board until he or she has served at least 25 years, and a defendant sentenced to LWOP will not meet the Board.

SIXTH CIRCUIT COURT OF APPEALS

***West v. Bell*, 2001 U.S. App. Lexis 2816**
(decided February 27, 2001)

Majority: Boggs (writing), Norris
Minority: Moore (writing)

A Tennessee federal district court's grant of a stay of execution was lifted because no pleading had been filed to invoke the court's jurisdiction.

Post-conviction counsel had attempted to obtain a stay so that they could file a habeas petition as next friends for their client. However, Judge Boggs, writing for the majority, found that although counsel had presented a post-conviction mental health report which stated that West had "some difficulties," they had very little other evidence to assist in the determination of whether West was truly incompetent and whether counsel could qualify as next-friends. Further, the procedure counsel undertook—moving to stay the execution and for appointment of counsel 8 months after post-conviction proceedings were complete, and nearly two months after the Tennessee Supreme Court had set an execution date was seen as manipulative. *Compare Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999).

DISSENT

Judge Moore believed that counsel had satisfied both criteria to qualify as next friend. *Id*., at *18-23. They had presented the court with reasonable cause to believe West was incompetent to decide whether to waive his habeas proceedings, including a 1995 mental health report showing that West was depressed, had mixed personality disorder and was extremely emotionally disturbed, testimony from his family regarding the amount of violent abuse West had suffered and an affidavit from a psychiatrist who needed more time to examine West for competency, but said there were indications of severe mental illness and illogic, especially in light of West's plan to be married a week after his execution date. Counsel had also presented evidence of the effect prison conditions were having on West's mental health.

The dissent also found little to compare this case with *Harper* because no evidentiary hearing had been held. Further, the majority's claim that the defense was manipulating the court's time constraints and the state's interest in finality was found lacking. Since counsel had three months remaining under the AEDPA's one-year statute of limitations, the state would not be unduly prejudiced by such a small amount of time.

Just before his scheduled execution, West decided to go forward with habeas proceedings.

***Workman v. Bell*, 2001 F3d. App. 0086P**
(decided March 23, 2001)

Majority: Siler, Ryan, Cole

Philip Workman asked the 6th Circuit to reopen his case and to appoint a special master to examine whether a fraud had been committed upon the court with regard to his application for executive clemency.

Specifically, Workman relied upon the language in *Herrera v. Collins*, 506 U.S. 390, 417 (1993) ("the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.") Workman presented evidence of actual innocence at a clemency hearing before the Tennessee Board of Pardons and Parole. He alleged that a fraud on the court occurred when the Tennessee Attorney General, some of his staff, persons associated with the Board of Pardons, representatives from the Shelby County (Memphis) prosecutor's office and members of the governor's staff held meetings designed to ensure that the result of those proceedings would be Workman's execution; the persons hearing Workman's evidence were hostile to some of his witnesses; the state fabricated expert testimony and a retired police officer testified during the hearing.

Because Workman was attacking the substantive merits of his hearing, not whether there were minimal procedural safeguards during the hearing, the court did not review his claims.

About thirty minutes before Workman's scheduled March 30 execution, the Tennessee Supreme Court granted his motion for a writ of error coram nobis. The case has been remanded to the Shelby County (Memphis), Tennessee courts to examine claims that the only eyewitness committed perjury (videotape recantation) and whether the "new scientific evidence" of a suppressed X-ray shows that the bullet that killed the police officer in the robbery melee did not come from Workman's gun. ■

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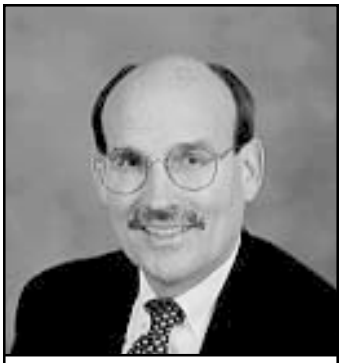
PLAIN VIEW . . .

by Ernie Lewis, Public Advocate



Ernie Lewis, Public Advocate

Illinois v. McArthur
121 S. Ct. 946; 148 L. Ed. 2d 838; __ U.S. __
(Feb. 20, 2001)

There have been a lot of significant developments in the law of search and seizure from the high courts of our land and Kentucky during this reviewing period.

Tera McArthur and her husband Charles were having problems. She asked two officers to go with her to get her belongings from her trailer. The officers stayed outside while Tera went in. When Tera came out, she told the officers that they should look inside because Charles "had dope" inside. When the officers knocked on the door and asked to search, Charles would not let them enter. One officer then left to get a search warrant. The other officer prohibited Charles from reentering his trailer without going inside with him. Eventually, a warrant was obtained, the officers searched the trailer and found marijuana and paraphernalia. Charles was prosecuted for a misdemeanor but succeeded in his motion practice.

The Illinois courts disfavored the actions of the police. The trial court granted a suppression motion, which was affirmed first by the Appellate Court of Illinois, and then sustained by a denial of a motion for leave to appeal by the Illinois Supreme Court. The US Supreme Court took the unusual step of granting review over what was in reality a ruling by a lower court in a misdemeanor.

Justice Breyer wrote for the Court overturning the opinions of the Illinois courts. His analysis began by stressing that the Fourth Amendment has reasonableness as its "'central requirement.'" The seizure in this case was viewed as reasonable because the "police had probable cause to believe that McArthur's trailer home contained evidence of a crime and contraband," because the police had "good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant," because the police had "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy," and finally because the "police imposed the restraint for a limited period of time, namely, two hours."

The only difficulty the Court seemed to have with this case was *Welsh v. Wisconsin*, 466 U.S. 740 (1984) in which the Court had held a "warrantless entry into and arrest in home unreasonable despite possibility that evidence of noncriminal offense would be lost while warrant was being obtained." The Court distinguished *Welsh* by the fact that the offense involved there was "nonjailable" while the offense here was punishable by jail. Further, the Court viewed the restriction here, keeping Charles out of the trailer while a warrant was obtained, as less intrusive than that involved in *Welsh*, the entry into the home.

"In sum, the police officers in this case had probable cause to believe that a home contained contraband, which was evidence of a crime. They reasonably believed that the home's resident, if left free of any restraint would destroy that evidence. And they imposed a restraint that was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests. In our view, the restraint met the Fourth Amendment's demands."

Justice Souter wrote a concurring opinion. He expressed that because of the probability of Charles' destroying the evidence if allowed to go back into the trailer pending the execution of the warrant, that "risk would have justified the police in entering McArthur's trailer promptly to make a lawful, warrantless search…. When McArthur stepped outside and left the trailer uninhabited, the risk abated and so did the reasonableness of entry by the police for as long as he was outside." Justice Souter stressed that underlying this case is the "law's strong preference for warrants," that is that the police in this case did precisely as we would want them to do by limiting Charles' freedom while a warrant was obtained.

Justice Stevens stood in lonely dissent. He believed that review should not have been granted in this case because "the governmental interest implicated by the particular criminal prohibition at issue in this case is so slight." If required to opine, he agreed with the Illinois courts that had decided differently from the 8-person majority. "Each of the Illinois jurists who participated in the decision of this case placed a higher value on the sanctity of the ordinary citizen's home than on the prosecution of this petty offense."

Ferguson et al. v. City of Charleston et al.
2001 U.S. LEXIS 2460
(March 21, 2001)

After a respite of some years, the Court has returned to explore the boundaries of the special needs search. You will recall that in previous cases, the Court had allowed for searches to occur both without a warrant and without probable cause where law enforcement could demonstrate cer-

tain "special needs." *See*, for example, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989).

In *Ferguson*, the Court explored whether special needs of law enforcement allowed a state hospital to conduct drug screens of pregnant women in order to coerce the women into drug treatment by the threat of prosecution. The Court, in a surprising decision, held that the privacy rights of the women outweigh any special needs of law enforcement, and did so precisely because at the heart of the state's case was the desire to prosecute the women.

This case arose when staff of the Medical University of South Carolina and the Solicitor of Charleston developed a policy to deal with what they perceived to be a growing problem of women coming into their facility addicted to crack cocaine. Women who had no prenatal care, or had late or incomplete prenatal care, or had "abruptio placentae," intrauterine fetal death, preterm labor, intrauterine growth retardation, previously known drug or alcohol abuse or unexplained congenital anomalies were required to be tested for cocaine through a urine drug screen. If the drug screen came back positive, the woman was allowed to go into substance abuse treatment to avoid arrest. If she declined treatment, the evidence was turned over to the police and she was arrested.

Ten of the women arrested pursuant to this policy filed a lawsuit against the City of Charleston, law enforcement and the Medical College. When the jury found against the plaintiffs, an appeal was taken to the Fourth Circuit, which found that the searches were justified by the special needs doctrine. The Court granted review.

The question posed by the author of the opinion, Justice Paul Stevens, was "whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." In a 6-3 opinion, the Court overturned the decision of the Fourth Circuit and found that these facts did not warrant a special needs exception to the warrant requirement. It should be noted that the Court decided this opinion assuming that the women involved did not consent; however, the case was remanded back to the trial court on the consent issue.

The Court found first that because the Medical College was a state hospital that its staff were "government actors, subject to the strictures of the Fourth Amendment." This is significant, as many of our hospitals in Kentucky are private hospitals, and thus the analysis may differ in the context of testing by a private hospital unless the searches are being done at the behest of law enforcement.

The Court next found that this case was different from previous special needs cases because "the hospital seeks to justify its authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients." The Court examined *Chandler v. Miller*, 520 U.S. 305 (1997), *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989), *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) and *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995). The Court notes that in *Ferguson* the "invasion of privacy in this case is far more substantial than in those cases." The Court further noted that the expectation of privacy involved here was far greater than in the other cases. The "critical difference between those four drug-testing cases and this one, however, lies in the nature of the 'special need' asserted as justification for the warrantless searches. In each of those earlier cases, the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." "In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment."

Because the "immediate" purpose of the policy was tied closely to law enforcement, the Court would not allow it to reach special needs status despite the fact that the ultimate purpose of the policy was to protect unborn children from cocaine addiction and to get crack addicted mothers into treatment. Indeed, the Court saw that if this search was to be justified, virtually any warrantless search could also be justified if while having a primary law enforcement purpose it also had a beneficent purpose. "Because law enforcement involvement always serves some broader social purpose or objective…virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment."

Justice Kennedy wrote a concurring opinion. Justice Kennedy disagreed with the distinction stressed by the majority between the ultimate purpose (the health of mother and baby) and the immediate purpose (law enforcement). Despite his disagreement regarding this, he agreed that the policy was inconsistent with the Fourth Amendment. Justice Kennedy was most uncomfortable with the role law enforcement played in the implementation of this policy. "The special needs cases we have decided do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives. The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes."

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Finally, Justice Scalia dissented at length, joined by Justice Rehnquist and Justice Thomas (in part). Justice Scalia believed that the women involved clearly consented to the seizure of the urine samples. "There is no contention in the present case that the urine samples were extracted forcibly." "Because the defendant had voluntarily provided access to the evidence, there was no reasonable expectation of privacy to invade. Abuse of trust is surely a sneaky and ungentlemanly thing…That, however, is immaterial for Fourth Amendment purposes, for *however strongly* a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities…Until today, we have *never* held—or even suggested—that material which a person voluntarily entrusts to someone else cannot be given by that person to the police and used for whatever evidence it may contain…I would adhere to our established law, which says that information obtained through violation of a relationship of trust is obtained consensually, and is hence not a search."

Further, even if there were a search, that search was justifiable under the special needs doctrine. The dissent believed that the primary purpose of the searches were not for law enforcement but rather "'to facilitate their treatment and protect both the mother and unborn child.'" The dissent also saw little difference between this case and that of *Griffin v. Wisconsin*, 483 U.S. 868 (1987). "Like the parole officer, the doctors here do not 'ordinarily conduct searches against the ordinary citizen,' and they are 'supposed to have in the mind the welfare of the [mother and child]. That they have in mind in addition the provision of evidence to the police should make no difference."

Colbert v. Commonwealth
2001 Ky. LEXIS 23
(Ky. 2/22/2001)

The Kentucky Supreme Court has decided a case of first impression: "The validity of a mother's consent to police officers' warrantless search of her adult son's bedroom located in her home, as well as of her personal effects, including a closed safe, absent direct evidence she had common authority over the room."

A mother, Delores Colbert, was having problems with her son Rontez Colbert and called the police for help. The police arrived and found Rontez putting on a bulletproof vest. After a struggle, Rontez was arrested and taken outside. An officer asked Delores if he could search Rontez' room. She replied: "'you can search anywhere in the house you want to and do whatever you gotta do; do whatever you want to do.'" Once inside the room, the police found an unlocked safe, which upon opening revealed six wrapped bundles of marijuana, 19 grams of crack cocaine, cash, a gun clip, and photographs of Rontez with weapons. Rontez was charged with trafficking in cocaine, trafficking in marijuana, resisting arrest, and second-degree assault. After losing a suppression hearing, Rontez entered a conditional guilty plea to 5 years in prison. The Court of Appeals affirmed the opinion of the circuit judge based upon *United States v. Matlock*, 415 U.S. 164 (1974) and *Illinois v. Rodriguez*, 497 U.S. 177 (1990). The Supreme Court granted discretionary review.

Justice Graves wrote the majority opinion affirming the Court of Appeals. He was joined by Justices Cooper, Lambert and Wintersheimer. The Court held that Delores Colbert had the authority to consent to the search of her son's bedroom, even where it was clear that the son did not want the search to occur. "Both state and federal courts have interpreted search and seizure law to allow third parties to consent to the search of shared common areas." The Court further looked at the relationship of the parties, nothing that in "LaFave's treatise on search and seizure, he notes that the power of a parent to consent to a search of the home derives not so much from the idea of common authority as it does from the status of parent."

More importantly, the Court further held that Delores could consent to the search of the safe in her son's room. The Court relied primarily on *Estep v. Commonwealth*, Ky., 663 S.W. 2d 213 (1983), a probable cause to search a car case, quoting with approval that the "scope of a warrantless search is defined by the object of the search and the places in which there is probable cause to believe it may be found. A lawful search of a fixed premises generally extends to the entire area in which objects may be found and is not otherwise limited."

The Court further justified their holding by citing *Katz v. United States*, 389 U.S. 347 (1967), in essence raising the issue of Rontez' standing to challenge the search. The Court stated that "the right to have an exclusive hiding place for drugs or weapons in one's mother's home, particularly in this case when Delores' shock at its discovery demonstrated she did not want it there, is hardly an expectation of privacy that society would acknowledge as reasonable."

The Court was not impressed with the argument that Rontez' presence at the scene made any significant difference. "Because of her superior right in the home, Appellant's mother was permitted to give consent, despite his presence."

Justice Keller wrote a lengthy dissent, twice as long as the majority opinion, joined by Justice Stumbo fully, and Justice Johnstone in part. His opinion was clear: "there can be no serious disagreement that Colbert had a reasonable expectation of privacy in his own bedroom and in a fireproof safe. The majority's assertion that society is unwilling to recognize Rontez Colbert's asserted expectation of privacy in contraband ignores two centuries of case law reversing criminal

convictions involving contraband on the basis of unreasonable searches, impermissibly attempts to justify the search on the basis of what the officers found and overlooks the fact that courts apply the exclusionary rule in order to deter future unreasonable searches."

Justice Keller would have found that the Commonwealth had failed to prove the mother had the legal authority to consent to the search of her son's bedroom and safe. He criticizes the majority for relying upon the mother/child relationship as authority to consent to search without proving that the child had authorized the search or that the parent had control over the area to be searched. "The majority's holding allows the Commonwealth to prove the reasonableness of a warrantless search by demonstrating only: (1) that a parent-child relationship existed between the third party giving consent and the defendant, and (2) that the parent held a property interest in the home. The 'presumption' created today by this Court fills in all the factual gaps." "Today's majority salvages this criminal conviction by creating a 'shortcut' around…the Commonwealth's burden to prove the reasonableness of its warrantless search by demonstrating valid third party consent. In order to do so, the majority removes any meaningful limitation on third-party consent searches in the parent-child context and impermissibly shifts the burden of proof upon the defendant."

Justice Keller further criticizes the majority opinion regarding the search of the safe. He notes that the *Estep* opinion is not a consent case. Quoting from Justice O'Connor's concurring opinion in *United States v. Karon*, 468 U.S. 705, 725-26 (1984), Justice Keller notes that the majority's opinion is contrary to clear U.S. Supreme Court caselaw. "A privacy interest in a home itself need not be coextensive with a privacy interest in the contents or movements of everything situated inside the home…**A homeowner's consent to a search of the home may not be effective consent to a search of a closed object inside the home…When a guest in a private home has a private container to which the homeowner has no right of access, the homeowner…lacks the power to give effective consent to the search of the closed container**." (Emphasis in the Dissenting Opinion).

Justice Keller further believed that the Commonwealth had failed in its burden to prove that the officers had a reasonable belief in Delores' apparent authority to consent. "Because I believe *Matlock* requires the Commonwealth to prove an actual nexus between the property to be searched and the third party who gives consent which requires more than an appeal to parental authority, I believe that 'apparent authority' exists only when officers obtain information which allows them to make an informed decision. As the officers in this case made no attempt to determine whether Delores Colbert had joint access to and mutual use of her son's basement bedroom and the fireproof safe contained therein, I hesitate to classify this search as reasonable on the basis of the officers' perceptions."

Wilson v. Commonwealth
2001 Ky. LEXIS 27
(Ky. 2/22/2001)

The Kentucky Supreme Court, in an opinion by Chief Justice Lambert, has explored the meaning of the exclusionary rule and specifically, the independent source doctrine.

In this case, the defense moved to suppress telephone records that had been subpoenaed by the prosecutor for the Jefferson Circuit Court grand jury. The trial court agreed. The trial court further suppressed all the evidence which resulted from the obtaining of the telephone records, including 15 pounds of marijuana found at Wilson's home pursuant to a warrant. The Commonwealth appealed. The Court of Appeals reversed, holding that there was an independent source for the probable cause supportive of the warrant to search the home. The Supreme Court granted discretionary review.

The Kentucky Supreme Court affirmed the Court of Appeals. Relying upon *Segura v. United States*, 468 U.S. 796 (1984), the Court noted that evidence "need not be excluded if the connection between the illegal conduct and the discovery and seizure of the evidence is highly attenuated, or when evidence has been obtained by means 'sufficiently distinguishable' from the initial illegality so that the evidence is 'purged of the primary taint.'" Utilizing this standard, the Court found that the connection between the obtaining of the telephone records and the evidence seized pursuant to the execution of a search warrant was "so attenuated that the primary 'taint' of the police conduct has been dissipated." The Court noted that the probable cause for the warrant was based upon complaints about the defendant's drug trafficking from an anonymous tip and from neighbors, upon surveillance by the police indicating a traffic pattern indicative of drug trafficking, upon the fact that the defendant's car was seen at a known drug dealer's house, upon the discovery of drug paraphernalia in her purse during a traffic stop and based upon her admissions at the police station during questioning. Accordingly, probable cause was present independent of the illegal obtaining of telephone records by the police for use before the grand jury.

Justice Stumbo wrote a dissenting opinion joined by Justice Johnstone. According to Justice Stumbo, the evidence supportive of probable cause came as a direct result of the information contained in the telephone records. "Had there been no phone records, Appellant's name and address would not have come to the attention of the police, her house would not have been placed under surveillance, and she would not have been stopped by the police and questioned in the first place…the doctrine of the fruit of the poisonous tree has steadily weakened over the past two decades. With the issuance of this opinion, it nears extinction in the Commonwealth."

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Love v. Commonwealth
2001 Ky. LEXIS 28
(Ky. 2/22/2001)

This is a lengthy opinion about many issues other than search and seizure. Much of the discussion regards evidence obtained by a hospital that was later used to convict the defendant of two counts of wanton murder, two counts of assault in the first degree, one count of assault in the third degree and several misdemeanors.

Following an awful traffic accident in Louisville, blood and urine were taken from Love at an unnamed hospital. The results were later used in the defendant's trial. The defendant challenged the admissibility of the blood test taken at the hospital "because it is interwoven with state action, i.e., Appellant was in police custody when the sample was drawn and tested." The Court noted that "absent any evidence that the blood was drawn at the request or direction of the police, there was no 'state action'" and thus no violation of the Fourth Amendment.

While the holding is quite clear, this case was decided prior to *Ferguson v. City of Charleston.* It is unclear what effect, if any, *Ferguson* will have on this particular holding.

Commonwealth v. Sharps
2001 Ky. App. LEXIS 14
(Ky. Ct. App.)
(2/16/2001)

Sharps was stopped at a roadblock in Bell County near a tunnel. As a result, he was charged with and convicted of DUI. He appealed to the Circuit Court, arguing that evidence of his BA should have been suppressed because it was seized pursuant to an unconstitutional roadblock. The circuit court agreed, and reversed Sharps' conviction, saying that the evidence "does not establish compliance with the [Kentucky State Police] plans for conducting road checks. The evidence does not establish or attempt to establish the location of the road check with reference to the entrance of the Tunnel. It does not establish the name of the Supervisor or person giving approval to this road check. It does not establish that the point at which the check was made in an area assuring reasonable safety to the general public." The Court of Appeals granted discretionary review.

Judge Emberton wrote an opinion reversing the circuit court, joined by Judges McAnulty and Schroder. The Court relied upon *Commonwealth v. Bothman*, Ky. App., 941 S.W. 2d 479 (1996) in which the Court examined whether a particular roadblock had complied with KSP General Order OM-E-4. The Court in *Bothman* stated that "*the dispositive question is* whether the establishment of the checkpoint and the subsequent discovery and seizure of the evidence passes constitutional muster. Technical noncompliance with OM-E-4, which does not have the force of law, does not inexorably lead to the conclusion that the establishment of the checkpoint was violative of the constitutions of the United States or of the Commonwealth."

The Court held that the roadblock in this case did pass constitutional muster. It avoided "the unconstrained discretion of random stops" by requiring a stopping of every vehicle. It was "reasonably calculated to protect public safety," and did not have an improper purpose not related to public safety. Accordingly, the roadblock was constitutional and the evidence seized as a result was admissible at the defendant's trial. ■

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Do all the good you can, by all the means you can, in all the ways you can, in all the places you can, at all the times you can, to all the people you can, as long as ever you can.

-John Wesley

FLOOD WARNING!!: WILL KENTUCKY GET HIT BY THE *APPRENDI* "WATERSHED?!"

Some thoughts on the constitutional requirement of grand jury indictment, jury fact-finding and proof beyond a reasonable doubt, before a sentence may be enhanced

by Margaret F. Case

Last year, the United States Supreme Court issued its opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and there ensued a nationwide discussion among criminal law practitioners over the decision's potentially far-reaching ramifications.

As two collaborating writers have described it: "The ripples of this recent Supreme Court decision are now being felt throughout the federal circuits, and will soon flood all jurisdictions. Ultimately, litigation over *Apprendi* may well top the high-tide mark formerly set by *Bailey v. United States*, 516 U.S. 137 (1995). Sands and Kalar, "*An Apprendi Primer: On the Virtues of a* 'Doubting Thomas,'" *The Champion*, (October 2000) page 18.

Apprendi is an opinion that makes you sit up and take notice, if only for the unusual alignment of justices on the issue at hand. Justice Stevens wrote the Court's opinion. He was joined by Justices Scalia, Souter, Thomas, and Ginsburg. Justices O'Connor and Breyer each wrote a dissent.

Even if that were not enough to make the opinion fascinating, the case's central holding is what Justice O'Connor's dissent calls a "watershed change in constitutional law," *Id.*, at 120 S.Ct. 2380 (O'Connor, J., dissenting). We in Kentucky need to look at how this important decision impacts our own practices.

This article is not intended as an exhaustive, scholarly explication of *Apprendi*, the intricacies of the various opinions, or the decision's historical precursors in Supreme Court jurisprudence. Rather, it has a more practical purpose. Its intent is to inspire defense lawyers to be on the lookout for all the places where Kentucky's criminal justice system might be vulnerable to an *Apprendi* litigation "flood," just waiting to be unleashed by creative defense counsel in response to this "watershed" decision.

THE *APPRENDI* FACTS

Charles Apprendi lived in an all-white New Jersey neighborhood. Apparently, he didn't like it when new African-American neighbors moved in. So, he proceeded to fire several .22-caliber bullets into their house.

After being charged with a multitude of different crimes, Apprendi entered into a plea agreement on three weapons-possession offenses. The two most serious offenses carried a penalty of 5-10 years each. A third offense carried a penalty of 3-5 years.

In Apprendi's plea agreement, though, the state reserved the right to use New Jersey's "hate crime" statute to seek an enhanced penalty for one of the two more serious offenses, second-degree possession of a firearm for an unlawful purpose.

Under the hate crime statute, if the trial court found by a preponderance of the evidence that Apprendi committed the crime with a motive to intimidate a victim because of racial bias, then his maximum possible sentence on that "enhanced" count would be doubled, from 10 years to 20 years.

Also as part of the plea agreement, the defense reserved the right to oppose the hate crime enhancement.

There had been no allegation in Apprendi's indictment that his actions had been motivated by racial bias. Indeed, the indictment did not even mention the hate crime statute. However, after an evidentiary hearing, the trial judge found that racial bias had been a motive.

So, for a crime which carried a statutory maximum sentence of 10 years, Apprendi was sentenced to 12 years.

THE *APPRENDI* ISSUES

Apprendi claimed that the hate crimes law was unconstitutional in two ways. First, he said it violated his constitutional right to a jury trial, because it allowed a judge to make the necessary factual finding about what his motive was, rather than requiring a jury finding. Second, he said it violated the constitutional guarantee of due process, because it set the fact-finder's standard of proof at "a preponderance of the evidence," rather than "beyond a reasonable doubt."

For years, the Court had been grappling with what constitutes "an element of the offense," (which requires jury fact-finding beyond a reasonable doubt), and what is a mere "sentencing factor," (which is a matter for the judge to decide in setting punishment, and which the judge may decide at a lower standard of proof).

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THE *APPRENDI* HOLDING

The Supreme Court agreed with Apprendi and struck down the New Jersey statute as unconstitutional, in violation of the right to jury trial and the guarantee of due process.

The central holding in *Apprendi v. New Jersey* reads like this:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . (I)t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." (Citations omitted.) *Apprendi*, *supra*, at 120 S.Ct. 2362-63.

Of particular importance to us in Kentucky is the majority's statement that the *Apprendi* decision

> was foreshadowed by our opinion in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 331 (1991), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (Citation omitted). The Fourteenth Amendment commands the same answer in this case involving a state statute. *Id*., at 120 S.Ct. 2355.

This statement by the majority about Jones is important for practitioners in Kentucky, because, in addition to dealing with jury decision-making and burdens of proof, it also deals with grand jury indictments. Apprendi's own case did not present the issue of what facts must be the subject of grand jury indictment before they can be used by the prosecution to enhance a sentence. But, *Jones* did. And, in a footnote, the *Apprendi* opinion quotes a "succinct rule": "(T)he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted," citing *United States v. Reese*, 92 U.S. 214, 232-233, 23nL.Ed.2d 563 (1875).

We in Kentucky do have a constitutional guarantee of grand jury indictment. Not all states provide a constitutional right to be proceeded against only by indictment, and the federal constitutional right has not yet been incorporated among the rights that apply to the states through the 14th Amendment. *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 292, 28 L.Ed.2d 232 (1884). But, Section 12 of the Constitution of the Commonwealth of Kentucky does guarantee the right to be proceeded against criminally only by indictment. And our state constitution, in dealing with the requirement of an indictment, uses language very similar to that in the Fifth Amendment to the federal constitution. The principles of *Apprendi* and *Jones* should apply to Kentucky cases.

Also militating in favor of the *Apprendi*/*Jones* rule requiring grand jury indictment on Kentucky sentence-enhancement factors is the principle that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution — and, in particular in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). So, while Kentucky is under no federal obligation to provide the right to grand jury indictment, it has chosen to do so and it must implement that right in accord with federal due process. If federal due process requires that facts increasing punishment must be the subject of grand jury indictment, then *Kentucky* enhancements must be the subject of grand jury indictment.

Therefore, under *Apprendi*, *Jones*, *Evitts*, and Section 12 of the Kentucky Constitution**,** any fact (other than a prior conviction) that increases the maximum penalty for a Kentucky crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

And, one final warning: The error inherent in violating this principle would not be subject to harmless error analysis, because such error would not be mere "trial error," but would be a "structural defect in the constitution of the trial mechanism." *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991).

APPRENDI/JONES IN KENTUCKY

The "get tough on crime" mentality, motivating Kentucky's elected lawmakers in our time, has resulted in many changes to Kentucky's penal code and to offenses outside the code. Throughout our statutory scheme for the trial of alleged offenders and the punishment of convicted offenders, there are instances now where an offender may be sentenced to a stiffer punishment on the basis of some particular fact(s) quite outside the limited list of facts in the statute which defines the person's offense.

In each such instance, the rule of *Apprendi* and *Jones* probably comes into play. Counsel representing a client in one of these situations must call upon the courts to protect that client's right to grand jury indictment, jury trial, and proof of the facts beyond a reasonable doubt.

What follows is a very incomplete sampling of situations where defense counsel in Kentucky criminal cases need to be considering the applicability of *Apprendi* and *Jones*.

"Hate Crimes"

Kentucky has its own "hate crimes" statute. In KRS 532.031(1), there is a listing of certain penal code provisions. If a sentencing judge determines by a preponderance of the evidence presented at trial that the defendant intentionally committed one of those listed crimes and that a primary factor in the commission of the crime was the "race, color, religion, sexual orientation, or national origin of another individual or group of individuals," KRS 532.031(1) and (2), then a series of adverse consequences can result for the defendant.

First, such a judicial finding "may be utilized by the sentencing judge as the sole factor for denial of probation, shock probation, conditional discharge, or other form of nonimposition of a sentence of incarceration." KRS 532.031(3). In addition, such finding "may be utilized by the Parole Board in delaying or denying parole to the defendant." KRS 532.031(4).

Can it be argued that these consequences are not sentence "enhancements?" Not very credibly. Other provisions of Kentucky law recognize readily that a sentence *with* a limitation on the possibility of early release is a higher sentence than that same sentence without such limitation. For example, a sentence of life imprisonment without benefit of probation or parole is higher than a sentence of life. KRS 532.030.

Counsel with a case in which the prosecution invokes the Kentucky hate crimes statute should consider challenging the constitutionality of the statute and object if the client stands to be subjected to an enhanced penalty without the protections of grand jury indictment and a jury finding beyond a reasonable doubt on the issue of the defendant's motivation.

Juvenile Cases

When the *Apprendi* decision was first announced, DPA's juvenile defense listserve members jumped into gear, looking excitedly for ways in which this case could help juvenile clients. The best thinking coming out of those discussions was that Kentucky's procedures for transfer decisions, especially automatic transfers, and for dispositional decisions are now in jeopardy.

For example, is KRS 635.020(4) unconstitutional? That statute allows the automatic transfer of a juvenile to circuit court "if, following a preliminary hearing, the District Court finds probable cause to believe that the child committed a felony, that a firearm was used in the commission of that felony, and that the child was fourteen (14) years of age or older at the time of the commission of the alleged felony." Such procedure, which results in the juvenile becoming "subject to the same penalties as an adult offender," is based upon a judicial finding of fact and a probable cause standard.

Advice coming from the listserve was that defense counsel with a firearm-felony transfer case should mount a concerted challenge to the automatic transfer statute, particularly if the case involves (a) a contested issue as to whether the object in question was a "firearm," and/or (b) a contested issue as to whether the object was "used" in the commission of the offense.

Even more basic: Perhaps this new decision from the Supreme Court establishes a "reasonable doubt" standard of proof for transfer hearings in general, not just the cases in which automatic transfer is relied upon. Under *Apprendi*, "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" must be proven beyond a reasonable doubt.

It was also suggested on the listserve that juvenile dispositions could be a fruitful area for *Apprendi challenges.* For example, defense counsel could include an *Apprendi* challenge when objecting against a juvenile court's use of unsworn assertions by a social worker, or hearsay in school records, or extra-judicial letters from victims as the bases for any disposition beyond the least restrictive alternative.

Death Penalty Cases

Last year, DPA's death penalty defenders also started their creative juices flowing, on how *Apprendi* applies to capital cases. After all, the difference between a sentence of life in prison and a sentence of death by injection of deadly chemicals into the body is the quintessential sentence enhancement.

Kentucky statutes list certain enumerated "aggravating circumstances," at least one of which must be found to exist before the defendant may be sentenced to death, or to life without the benefit of probation or parole, or to life without the benefit of probation or parole until the defendant has served a minimum of 25 years. KRS 532.040(4); KRS 532.025. If no aggravating circumstance is found, then the maximum possible penalty is life imprisonment or a term of years in prison, both of which include the usual possibility of early release.

If the case is tried to a jury, it is the jury's fact-finding job to determine whether any aggravating circumstance exists. And, that finding must be based upon proof beyond a reasonable doubt. So, Kentucky appears to have in place the jury trial procedures mandated by *Apprendi*.

However, the grand jury indictment requirement of *Jones*, reinforced by the holding in *Apprendi*, may certainly be another matter. Prosecutors have not been making it a practice to present aggravating circumstances to their grand juries.

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In non-death situations, prosecutors **do** present sentence-enhancing factors to their grand juries. For example, under KRS 218A.992, a sentence for violating the controlled substances statutes can be increased by one class if the defendant possessed a firearm at the time of the offense. A defendant charged with a misdemeanor offense suddenly faces a sentence in the Class D felony range. In these cases, felony prosecutors are typically presenting the fact of the firearm possession to their grand juries and obtaining indictments which include that specific factual allegation.

The same should be true of aggravating circumstances in capital cases. Defense counsel should be challenging the use of aggravating circumstances in any case where those circumstances have not been the subject of grand jury indictment.

Extreme Emotional Disturbance

DPA's death penalty lawyers also noted that *Apprendi* might be used in EED cases, to support the continuing argument that the **absence** of EED is an element of the offense of murder and, as such, must be proven by the prosecution beyond a reasonable doubt.

Under KRS 507.020, a defendant can be convicted of murder when, with intent to cause the death of another, the defendant causes the death of that person or some third person, unless the defendant was acting under the influence of extreme emotional disturbance. Until the 1980s, the Kentucky Supreme Court acknowledged that the murder statute lists absence of EED as an element of the crime, which the prosecution must prove beyond a reasonable doubt. But, in 1985, the Court reversed course and continues to hold now that absence of EED is not an element of murder. *Spears v. Commonwealth*, 30 S.W.2d 152 (2001).

Apprendi should help defense counsel in EED cases, because the U.S. Supreme Court has made clear that states may not circumvent the constitutional protection of proof beyond a reasonable doubt by redefining the elements of a crime and calling them merely factors which involve the proper level of punishment. Indeed, the *Apprendi* decision includes a discussion of burdens of proof in murder/manslaughter cases involving "heat-of-passion". *See Gall v. Parker*, 231 F3d 265, 286-306 (6th Cir. 2000) for an important discussion and ruling on EED; the Sixth Circuit Court of Appeals, in granting federal *habeas* relief on this very issue, cited to *Apprendi*.

Mandatory Minimums

Violators of Kentucky's DUI statutes are subject to mandatory minimum terms of imprisonment under KRS 189A.010(5), "if any of the aggravating circumstances listed in subsection 11 of this section are present." There are 6 aggravating circumstances listed.

These DUI aggravating circumstances are much more recent than the death penalty aggravators described above. This means that defense counsel must be extra vigilant in making sure that the courts, in dealing with this new area of the law, are requiring jury findings beyond a reasonable doubt before imposing these mandatory minimums on defendants.

And, just as with the death penalty aggravating circumstances described above, DUI aggravating circumstances are not generally being indicted upon in Kentucky at the present time. Counsel should challenge imposition of these mandatory minimums in cases where there has been no grand jury indictment on the aggravators.

It might be argued that cases involving mandatory minimums are distinguishable from the *Apprendi* situation, since mandatory minimums *narrow* the sentencing range rather than extending it. However, the majority decision in *Apprendi* carefully side-stepped any precise ruling on mandatory minimums which are dependent upon a finding of fact, saving those issues for another day. That means that it will be up to aggressive defense counsel to bring about that "other day". Indeed, the Sixth Circuit Court of Appeals recently remanded a case involving federal cocaine offenses, where the trial court imposed a mandatory minimum sentence based upon the amount of cocaine involved being in excess of five kilograms. The case was remanded pursuant to *Apprendi*, because the prosecution had neither charged nor attempted to prove to the jury the quantity of cocaine necessary before the mandatory minimum could apply. *United States v. Ramirez*, Case No. 98-6130, decided 02/16/01.

Drug/Firearm Cases

Defense counsel should be watching for *Apprendi/Jones* opportunities in even misdemeanor drug cases. Under KRS 218A.992, even a misdemeanor can carry an enhanced sentence if a firearm is involved. A misdemeanor sentence can be elevated into the Class D felony range. If a district court tries to impose such an enhanced sentence without all the protections afforded by *Apprendi* and *Jones*, defense counsel should be prepared to make the appropriate challenges. The same is true if a circuit court tries to do so on the basis of an indictment which did not include the firearm-enhancement factor, or on the basis of something less than a jury finding beyond a reasonable doubt.

Domestic Violence Cases

Under KRS 508.032, a fourth-degree assault, (normally a misdemeanor), may be indicted upon and tried as a Class D felony if it is the defendant's third or subsequent offense within five years against a family member or member of an unmarried couple. There are explicit definitions of "family member" and "member of an unmarried couple," which apply.

Superficially, this statute might look like just another "prior offense" situation which, at least arguably, falls outside the *Apprendi*/*Jones* mandate. But, a closer look is called for.

What if none of the prior offenses involved a jury finding, beyond a reasonable doubt, that the victim in that case was a family member or member of an unmarried couple, as defined by statute? It would seem that, in this situation, an enhanced penalty in the subsequent case would be dependent upon a grand jury indictment and upon a decision beyond a reasonable doubt, either by the petit jury or by the judge sitting as trier-of-fact, on the issue of whether the prior victims were family members or members of an unmarried couple.

Prohibitions Against Early Release

The penal code is replete with provisions eliminating the possibility of probation, parole, or conditional discharge for a defendant upon the finding of some extra fact(s). For example, KRS 533.065 covers the situation of a defendant who, at the time of the offense, was wearing body armor and was armed with a deadly weapon. And, KRS 532.045 prohibits probation or sentence suspension for a sex offender if one of 8 additional, listed criteria are met, (such as, the defendant "occupies a position of special trust and commits an act of substantial sexual conduct" or the defendant "caused bodily injury to a minor").

As was suggested previously in this article, (in the discussion of Kentucky's hate crimes statute), a sentence without possibility of early release is a *higher* sentence than the same sentence *with* possibility of early release. Therefore, whenever defense counsel is confronted with a case in which early release could be prohibited because of some extra fact outside the statutory definition of the client's offense, counsel should be objecting to (a) lack of an indictment on the extra fact, (b) lack of a jury finding on the extra fact, and/or (c) proof below the reasonable doubt standard as to the existence of the extra fact.

Restitution

Should the restitution component of a defendant's sentence be subject to the constitutional protections of *Apprendi*? KRS 532.032 recognizes that restitution is one of the "penalties" which may be ordered against a guilty defendant. KRS 532.356 calls restitution a "sanction". Therefore, a sentence of 5 years imprisonment plus restitution of $2,000 is a *higher* sentence than just 5 years imprisonment alone.

After *Apprendi*, defense counsel should object to any attempt at imposing the punishment of restitution if there has not been a grand jury indictment and a finding by the trier-of-fact, beyond a reasonable doubt, as to the fact and amount of the victim(s) loss.

In the right case, this matter of restitution could end up being a very hotly-contested evidentiary fight. It has been said that "theft of identity" cases are one of the fastest-growing categories of crime. Kentucky's penalty statute on identity theft, KRS 532.034, mandates that a guilty defendant shall make restitution for a victim's financial loss, and "(f)inancial loss may include any costs incurred by the victim in correcting the credit history of the victim or any costs incurred in connection with any civil or administrative proceeding to satisfy any debt or other obligation of such victim, including lost wages and attorney's fees." One can imagine a day-long trial just on the victim's financial loss.

Fines

Under KRS 534.030, "a person who has been convicted of any felony shall, in addition to any other punishment imposed upon him, be sentenced to pay a fine in an amount not less than one thousand dollars ($1,000) and not greater than ten thousand dollars ($10,000) or double his gain from commission of the offense, whichever is the greater." The statute goes on to list four factors which "the court" must consider in determining the amount of a defendant's fine and the method of paying the fine.

Since a defendant's fine is considered a "punishment" under KRS 534.030, the constitutional protections recognized in *Apprendi* and *Jones* should apply. How can a sentencing court decide on the level of fine to impose, without a factual finding on how much the defendant gained from commission of the offense? Since the level of punishment is dependent upon a factual finding, the fact of the defendant's level of gain should be the subject of grand jury indictment and the subject of trial fact-finding beyond a reasonable doubt.

What *About* Those Prior Convictions?

The precise holding in *Apprendi* was this: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt". But, it is by no means a settled matter that a defendant's sentence may be enhanced on the basis of a prior conviction without the protections called for in *Apprendi* and *Jones*.

The case on using prior convictions as sentence-enhancers was *Almendarex-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). By a 5-4 vote in that case, the Court held that the defendant's federal indictment was sufficient, even though it did not mention prior convictions upon which the prosecution based an enhanced sentence in the new case.

But, first, the *Apprendi* opinion acknowledges that *Almendarez-Torres* may have been incorrectly decided,

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Apprendi, *supra*, 120 S.Ct. at 2362. Second, and very importantly, one of the votes in the *Almendarez-Torres* majority was from Justice Thomas, who has now written in an *Apprendi* concurrence that he believes he erred in his earlier vote and that he believes even a prior conviction must go to the jury in the subsequent, enhancement case, *Apprendi*, 120 S.Ct. at 2379, (Thomas, Jr., concurring). And, third, *Almendarez-Torres* involved a guilty plea in the subsequent case, in which the defendant admitted, and did not challenge, the priors; the *Apprendi* decision says "that a logical application of our reasoning today should apply if the recidivist issue were contested . . ." *Apprendi*, *supra*, 120 S.Ct. at 2362.

CONCLUSION

This article has raised some questions for which there are as yet few hard-and-fast answers, since the full impact of *Apprendi* and *Jones* won't be known until we have gone through many years of debate and many years of conflicting lower-court rulings. The practitioner contemplating an *Apprendi* challenge in any particular case should check for emerging caselaw which applies *Apprendi* to his or her particular fact situation.

My hope is that the few examples listed here will remind defenders to remain alert for the myriad situations in which *Apprendi* and *Jones* could help a client. Who knows? Kentucky's creative and courageous defense lawyers may be the ones setting up the cases, which ultimately result in the Supreme Court's explanations, refinements, and extensions of *Apprendi*. ■

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Ignorance of the Law *IS* an Excuse! Suppressing Prior Guilty Pleas Under *Boykin v. Alabama*

by Brian Scott West

Ignorantia legis neminem excusat! It infuriates me when a prosecutor says that "ignorance of the law is no excuse," and it irritates me even more if he says it in Latin. Invariably, the phrase is thundered out as though it were one of the Ten Commandments, or written in the Declaration of Independence. Like it would be upsetting the world order if anyone were to take into account, for instance, that a defendant was unaware that her prescription drug had possible side effects that could impair her driving.

Most of the time I hear the phrase at sentencing, after guilt has already been admitted, and the issue is *not* whether my client should be *excused* of committing the crime, but rather, whether there are any mitigating factors to be considered in selecting the proper *punishment.* In the punishment context, the client's mental state at the time of the crime, especially any lack of knowledge of the criminality of her act, is always relevant for mitigation. Of course, there is no antiquated Latin phrase that neatly encapsulates *that* concept, leaving me without a sound bite of equal bravado.

In the guilt/innocence context, admittedly, the prosecutors are correct – ignorance of the law does not normally excuse the commission of an offense, whether the client is ignorant of the law itself ("I didn't know putting prescription medicine in a different container is illegal!"), or though knowledgeable of the law, ignorant of a fact ("I thought the speed limit was 55, not 25!").

But what if a defendant pleads guilty to what she thinks is a crime, but really is not? If she later learns that she pled guilty in ignorance, can she ever be relieved of the consequences of that guilty plea? The answer is crucial whenever a person is charged with a second or third offense of a crime that enhances the punishment with each successive conviction.

The purpose of this article is to discuss the "*Boykin* Motion," named after *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969), and its use in suppressing a defendant's prior offenses when those priors are being used to enhance the penalty for the current offense of which he is being charged. Although commonly thought of as a "DUI" motion, the "*Boykin* Motion" can be used (1) to suppress evidence of any prior offense, such as driving on a DUI suspended license or a spousal assault, (2) avoid a transfer of a juvenile case to circuit court, or even (3) prevent a case from being bound over at a preliminary hearing. Successful suppression of priors will relieve the client of at least the enhancement consequences of her ignorant guilty plea, and conceivably result in having the conviction over-

turned altogether, depending upon the timing, circumstances and jurisdiction of the case.

I. *Boykin v. Alabama*

Edward Boykin was a 27-year-old youth charged with committing five armed robberies in Mobile, Alabama. At the time, armed robbery was punishable by death in Alabama. Although counsel represented Boykin, he pled guilty to all five indictments upon arraignment. According to the record, the judge accepted his pleas, but asked no questions of Boykin, and Boykin did not address the judge.

Following arraignment, the case was scheduled for a sentencing trial. Edward Boykin did not testify at trial, and, although he apparently had no prior criminal record, no evidence concerning his character or background was placed into evidence. The jury returned a recommendation of death for each of the five robberies.

On appeal, the Alabama Supreme Court affirmed the penalties, although three of the justices in dissent argued that the record was wholly inadequate to show that Boykin had intelligently and knowingly pleaded guilty to the offenses. Interestingly, this issue was not presented by the petitioner for review, but was raised by four of the justices on their own motion.

The United States Supreme Court granted *certiorari*, and reversed the conviction on the grounds argued by the dissenters. The Court held:

> It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary…
>
> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction….Admissibility of a confession must be based on a "reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant" [citations omitted].
>
> The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation [citations omitted]. In *Carnley v. Cochran*, 369 U.S. 506, 516 L.Ed.2d 70, 77, 82 S.Ct. 884, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.…"
>
> **We think that the same standard must be applied to determining whether a guilty plea is voluntarily made…**[p. 242, emphasis added].
>
> **The three dissenting justices in the Alabama Supreme Court stated the law accurately when they concluded that there was reversible error "because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty"** [p. 244, emphasis added].

The Supreme Court issued its holding in spite of the facts that: (1) Boykin was represented by counsel, (2) Boykin had never attempted to withdraw his pleas, (3) Boykin never on appeal had asserted that his guilty pleas were involuntary or made without knowledge of its consequences, and (4) Boykin had other post-conviction remedies to pursue his relief, including, presumably, ineffective assistance of counsel.

The impact of the Court's holding was not lost upon Justice Harlan, who said in dissent that the Court's reversal was "predicated entirely upon the failure of the arraigning state judge to make an 'adequate' record."

The focus of the successful *Boykin* motion, then, is on the record of a guilty plea, and whether it shows on its face that the defendant's plea was "voluntary," that is, "intelligently and understandingly" made.

II. Substantive Use of *Boykin* in Court

In *Boykin*, the Court found involuntary the very guilty plea taken in the same case it was reviewing. Limited to that context, *Boykin* is not really helpful for criminal defense trial attorneys. Kentucky's Rule of Criminal Procedure 8.10 allows the judge to permit withdrawal of a guilty plea, and a plea of not guilty substituted, any time prior to judgment. If a defendant asserts that his guilty plea was not voluntarily made, most judges will allow a hearing on the issue, and will permit the withdrawal if there is any evidence whatsoever that the plea was made unintelligently or unknowingly. If the judge does not allow the withdrawal, the appellate court will have the benefit of *Boykin*, along with a record to review.

The real value of *Boykin*, however, is not in throwing out the guilty plea in your instant case – the value is in throwing out the guilty pleas (thereby suppressing the convictions) of prior cases being used by the Commonwealth to enhance the penalty in your case.

Although there are many offenses, both felonies and misdemeanors, which increase the potential jail time with each subsequent offense, in Kentucky, opportunities to use *Boykin* to suppress prior convictions are more plentiful in district court as compared to circuit court. In my opinion, this is chiefly because of two reasons.

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First, it is uncommon for circuit judges to arraign defendants without the presence of counsel. In the jurisdictions in which I practice, all the circuit judges make DPA appointments prior to arraignment, and schedule arraignments at a time when they know an assistant public advocate will be available in court. Defendants represented by private counsel are also arraigned when their counsel can be present. In district court, however, defendants are often arraigned first, and appointed counsel only after a plea of not guilty is entered and a request for counsel has been made.

Second, misdemeanors carry lower penalties than felonies, and thus a defendant is more likely in district to plead guilty to a first offense without consulting a lawyer. DUI, 1st offense, for instance, carries a minimum of 48 hours in jail. Often, a defendant has been in jail that long, or almost that long, by the time she has been arraigned, and a plea offer by the prosecution to give the minimum jail time in exchange for a guilty plea looks inviting. On the other hand, in circuit court the lowest class felony carries a potential 1 to 5 years in prison, making it extremely unlikely that a defendant will jump on a guilty plea without advice of counsel.

In district court, the opportunity to use *Boykin* arises most frequently in DUI cases and driving on DUI suspended license cases, where prior convictions enhance the penalty, but the case remains a misdemeanor. Domestic assault cases also offer an opportunity to apply *Boykin* to avoid enhancement of a charge.

In circuit court, there are many cases, especially drug cases, where a first offense is a Class D felony, and subsequent offenses are Class C and D felonies. In those instances, it is rare that a prior conviction will be found involuntary because nearly every circuit judge, when accepting guilty pleas, uses the "bench book" which very meticulously discerns whether the plea is voluntary, knowing, understanding and intelligent, and queries the defendant and her counsel on whether the defendant knows her rights and the consequences of her plea. This is the true legacy of *Boykin*.

Nevertheless, *Boykin* opportunities in circuit court do occur with some frequency. DUI, fourth offense, driving on a DUI suspended license, third offense, and other "first time felonies" where the enhancing prior convictions were all misdemeanors, present most of the *Boykin* litigation in circuit court.

A. DUI Cases

Driving under the influence, first and second offenses, are misdemeanors, but neither falls into usual misdemeanor classifications. Without the existence of aggravating factors, a first offense carries a maximum penalty of 30 days, not quite a Class B, and a second offense carries a possible penalty of six months, not quite a class A, but more than a Class B. A third offense carries up to 12 months in jail, but the minimum time is less than the minimum of a Class A misdemeanor, which can be fine only with no jail time at all. KRS 189A.010.

As stated above, it is quite common for a defendant to plead guilty upon arraignment of a first or second offense in exchange for an offer of the minimum penalty. When the third DUI comes, however, defendants may balk at spending the minimum 30 days in jail, and request a lawyer. Regardless of whether defense counsel has a good defense on the merits, or a great chance at suppressing evidence, the conscientious lawyer will check to see if the two prior cases are vulnerable to a *Boykin* challenge. Lawyers who check do find in cases that the record of a prior DUI show that the defendant was given no information on which to base her plea, and they do find in some cases something substantive like one of the priors was pled with a .06 blood/alcohol level; or the police observation time on the breathalyzer ticket was only ten minutes. These findings are things that a knowledgeable attorney could have used to alter the outcome of the plea.

As an aside, this attorney has had precious little opportunity to use *Boykin* in district court practice. The district judge before whom I most frequently practice – as well as the judge which handles his conflict cases — use the form guilty plea for DUI's, and take great pains to inform a defendant of the consequences of her guilty plea. The two opportunities that have arisen involved guilty pleas taken in another county or another state, and both of these cases were circuit cases.

However, *Boykin* opportunities do arise, and apparently often enough that Kentucky's General Assembly thought fit to address *Boykin* directly, at least in a prior version of the DUI laws. KRS 189A.310 *used* to provide as follows:

> (1) A court may, upon application of the defendant, and with notice to the Transportation Cabinet, which shall be a party, and if the facts of the case so indicate, order that a prior conviction cannot be used to enhance penalties or license suspensions or revocations, or for other purposes for which a conviction might be used.
>
> (2) Determinations pursuant to this section shall be made in strict conformity to the requirements of *Boykin v. Alabama*, 395 U.S. 238 (1969), and the requirements of that case shall not be expanded upon unless later applicable case law so dictates.
>
> (3) The provisions of this section shall not apply to a case in which the prior conviction has not been subject to final judgment, or is under appeal at the time the defendant makes the application pursuant to subsection (1).

(4) The Transportation Cabinet shall give full faith and credit to any court decision meeting the requirements of this section.

The statute was sort of a good news/bad news for a criminal defense lawyer and his clients. On the one hand, the statute was absolute irrefutable proof that *Boykin* could be used to suppress *prior* convictions, and was not limited to suppressing or revoking a guilty plea in the instant case. On the other hand, the statute created a "rabbit trap" for the unwary – failure to serve the Transportation Cabinet and make them a party would result in a denial of the case without a determination of the merits for failure to name a necessary and indispensable party. Billingsley and Zeveley in *Kentucky Driving Under the Influence Law,* (2000) at 115, state that in practice, the Transportation Cabinet has not taken an active role in litigating *Boykin* issues, would not send anyone to take part in the motion, but instead would generally send the court a copy of the prior judgment.

The requirement of serving the Transportation Cabinet was repealed by the 2000 General Assembly, as well as the provision limiting the expansion of *Boykin*. Moreover, the motion may now be filed by defendant's counsel, the Commonwealth, or the Court, on its own motion. Of course, any cases remaining which are still being prosecuted under the version of 189A.010 effective prior to October 1, 2000 may still require the service of the Cabinet. Notwithstanding any argument that current KRS 189A.310 has retroactive application, counsel should serve the cabinet out of an abundance of caution.

In addressing the merits, counsel should do his best to find an issue in one of the prior convictions which seriously raises the issue of whether a guilty plea was intelligent, and not rely solely upon the fact that the client was unrepresented and uninformed about the consequences of her plea. Maybe the guilty plea was based upon a positive urine test for drugs, or a breathalyzer which had not been functioning correctly for days. If counsel can demonstrate to the court an articulable, triable issue, he is more likely to persuade a court to suppress the prior conviction.

B. Driving on a DUI Suspended License

Under the old law, driving on a DUI suspended license was a Class B misdemeanor for the first offense, a Class A misdemeanor for the second offense, and a Class D felony for the third. KRS 189A.090. Since October 1, 2000, a second offense has been elevated to a felony if committed while operating a motor vehicle under the influence of drugs or alcohol. Because of the possibility of a felony on only the second offense, suppression of the first offense can be critical.

At first glance, it might appear difficult to suppress a conviction for driving on a DUI suspended license because of the ease in proving guilt; the Commonwealth need only prove that the defendant was operating the vehicle while his license was still suspended or revoked because of a DUI. Since usually operation was observed by the policeman that pulled him over, and the period of suspension is a matter of looking at the calendar. When the proof is so ironclad that a conviction is assured, it is difficult to make the argument that a guilty plea for the standard minimum (*e.g.*, 30 days probated, minimum fine) is unintelligent or involuntary.

Nevertheless, the prior conviction should be examined. Very often a client pleads guilty because he knows his license was suspended for a DUI, and he knows that he did not get his license back before he was pulled over. However, it may be that his statutory mandatory period of suspension had passed, and he simply had not yet gotten his license back because he did not complete the DUI classes, or because he did not attempt to get his license back immediately upon expiration of the mandatory period of suspension. In such a case, the county should charge with driving on a suspended license, but not a *DUI suspended* license.

In *Dixon v. Commonwealth*, 982 S.W.2d 222, 224 (Ky. App. 1998) the Court of Appeals held that operation of a motor vehicle following the expiration of a mandatory suspension of DUI was not a violation of KRS 189A.090:

> In other words, during his period of suspension, one whose license has been revoked may not, under any circumstances, be reinstated, whereas after the expiration of the suspension period, one becomes conditionally eligible for reinstatement once he complies with KRS 189A.070(3). It is true that Dixon's license was suspended for a second DUI violation of KRS 189A.010. **However, after the twelve-month period of suspension had expired, Dixon's failure to attend the alcohol abuse education program then became the reason that his license remained suspended.** Under that circumstance, we do no believe that Dixon can be prosecuted under KRS 189A.090, when KRS 186.620(2) provides for an alternate penalty for operating a motor vehicle on a suspended license.
>
> Because we believe that the language of KRS 189A.070 creates a period of suspension which bars reinstatement, which can be followed by a period of suspension during which one can become eligible for reinstatement, we believe that the rule of lenity followed by our highest Court should apply. **The criminal sanctions provided for violations of KRS 186.620(2) should apply to Dixon, rather than the criminal sanctions in KRS 189A.090.** [Emphases added.]

If a client's prior offense should have been charged under KRS 186.620 rather than 189A.090, then his "second" driving

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on a DUI suspended license would become his first, saving him from a felony conviction next time, and possibly this time. A violation of KRS 186.620 is a Class B misdemeanor, and the penalty does not increase with each successive conviction. It cannot be argued with a straight face that a client's guilty plea to the offense created by 189A.090, when the proper charge lies under 186.620, can be intelligent. A good criminal lawyer would have told him so, and a motion to amend the charge would have been sustained.

C. Domestic Assaults

The defendant who pleads guilty to misdemeanor assault against his spouse and gets probation or minimal jail time may not know that the third time he is charged with a domestic assault he can be charged with a felony. KRS 508.032. That is a material fact which of which the defendant should have been made aware before simply pleading to probated time. Counsel representing a defendant on that third and felony charge (which of course will be in circuit court) should check the prior two convictions to determine whether they are excludable under *Boykin*.

III. Burden of Proof

When attempting to exclude for enhancement purposes a prior conviction, it is not sufficient merely to establish a "silent" record. The Commonwealth upon producing a certified and ostensibly valid final judgment will benefit from a presumption that the judgment is in fact valid and the guilty plea which supports it is in fact voluntary.

Thereupon, the burden shifts to the Defendant to produce evidence that rebuts the validity of the judgment. Essentially, this means the client will have to testify that she did not understand her rights or the consequences of her plea, or otherwise produce "affirmative evidence which refutes the presumption of regularity." *Dunn v. Commonwealth,* Ky., 703 S.W.2d 874 (1985).

Then the burden falls back upon the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. "A silent record will not suffice." *Id.* at p. 876.

In summary, while the ultimate burden rests upon the Commonwealth, the defendant is not without a burden of showing the court some evidence that she failed to understand the underpinnings of her plea and the rights she was waiving.

IV. Mechanics of a "*Boykin*" Motion

The "*Boykin*" motion should not be called a "*Boykin*" motion; that nomenclature has been used by this author out of convenience. When filed in court, the motion should be styled "Motion to Suppress" or "Motion to Correct, Modify or Reform the Judgment," depending upon the circumstances.

A. Motion to Suppress

When you are in a court and seeking to suppress a prior conviction taken in another court, file a motion to suppress. When you ask a court to disregard the prior conviction, you are not asking the court to overturn, change or reverse the prior conviction; the court has no jurisdiction to do that. What you are actually doing is asking the court to suppress the *evidence* of that conviction, evidence necessary for the Commonwealth to prove enhancement of the penalty. Thus, you file the motion that you would normally file whenever you are seeking to suppress evidence.

A motion to suppress will be handled by the Court in accordance with Kentucky RCr 8.22. A hearing will be held outside the presence of a jury, at which a verbatim record will be made of all proceedings, including such findings of fact and conclusions of law as are made orally.

The issue can also be raised at a preliminary hearing; although counsel should realize that the Commonwealth's burden will be much lower than it would have in circuit court on the issue at a later time. At a preliminary hearing, the Commonwealth need only establish "probable cause." This can be accomplished by producing a certified copy of all necessary prior convictions. Defense counsel can move to suppress the convictions on *Boykin* grounds, but normally a district court will not consider suppression issues during a preliminary hearing. However, if the district court conducting the preliminary hearing is the same court in which a prior conviction was taken, the court may consider the issue, out of judicial expediency, since it is possible that the case could be reopened in his court on motion of defense counsel, which segues into….

B. Motion to Correct, Modify or Reform the Judgment

If the prior conviction you are seeking to suppress was taken in the same court in which your present case is pending, you may seek to suppress, or you may seek to reopen the case by filing a motion to correct, modify or reform the judgment. Under Kentucky Civil Rule 60.02 (made applicable to criminal cases by RCr 13.04) a court may "upon such terms as are just" relieve a defendant from its final judgment, order or proceeding on the grounds of mistake, inadvertence, excusable neglect, or surprise, if these grounds are established within a year of the judgment, or for "any other reasons of an extraordinary nature justifying relief," regardless of time. *Boykin* can be used to establish these grounds. For instance, a person charged with driving on a DUI suspended license rather than a suspended license can claim mistake or surprise. If over a year has passed since his last prior, an

unknowing, unintelligent, and therefore involuntary plea may suffice as a reason of an "extraordinary" nature. If the case is reopened and the judgment is reformed, for instance, to make the person guilty of driving on a suspended license, the County will not have the conviction to prove for enhancement purposes in your present case.

The advantage of a CR 60.02 motion is that it gives the trial judge a chance to correct a mistake; a motion to suppress leaves the mistake unchanged on the record. If your case is not in the same court the prior case was in, think about filing a 60.02 motion in the prior court and getting a reformed judgment, if you have time before disposition of your present case.

V. State Limitations on *Boykin*

In law school I was taught that United States Supreme Court law trumps State Supreme Court law on federally guaranteed rights, and the idea of a state limitation on Supreme Court decision seemed absurd. You live, you learn.

This article has already discussed how, procedurally, a state statute can prevent a "*Boykin*" motion from being considered on the merits through the failure to name the Transportation Cabinet as a party. But there are substantive limits placed on *Boykin* as well. In *Hodges v. Commonwealth*, 984 S.W.2d 100 (Ky. 1998), a case involving a felony DUI, the Kentucky Supreme Court held that a *Boykin* violation had been waived where the defendant had failed to challenge the prior DUI convictions at the time guilty pleas were entered in the second and third priors. The Court held:

> In [*Graham v. Commonwealth*,952 S.W.2d 206 (1997)], this Court reaffirmed the waiver logic of *Howard v. Commonwealth*, 777 S.W.2d 888 (Ky. 1989), in which the failure to challenge the validity of a prior conviction upon conviction as a PFO II barred such a challenge in the subsequent PFO I prosecution. The same logic equally applies in this case, in which Hodges with the assistance counsel pled guilty to the felony of fourth offense DUI in 1994, presenting no challenge to the validity of the three relevant prior DUI convictions. Hodges, who we also note was well aware of DUI law and his constitutional rights prior to the 1992 and 1993 guilty pleas which bear his signature, waived any argument in that regard under all circumstances of this case.

Hence, under *Hodges*, an effort to suppress a conviction other than the one immediately prior to the current case may be subject to waiver analysis, at least in the Commonwealth of Kentucky. This seems anomalous.

If a guilty plea is involuntary — not intelligently or understandingly made when entered – why should a defendant be taxed with superior knowledge the very next time he is in court? If his plea was not voluntary when made, how does pleading to a second offense make the first offense any more voluntary?

Hodges may have established, as the last quoted sentence above suggests, a totality-of-facts-and-circumstances test. Therefore, that case and its result may be distinguishable from cases where the defendant has not demonstrated in the record an awareness of DUI and constitutional law (as *Hodges* apparently did), or has no attorney (unlike Hodges). In fact, if the record did establish that Hodges knew DUI law and his constitutional rights, then the "silent" record discussed in *Boykin* did not exist in that case, raising the question of whether there really was a *Boykin* issue.

If the current case is not distinguishable, defense counsel should still attempt to use *Boykin* to suppress all prior involuntary guilty pleas regardless of when they were entered. Cite *Hodges*, but argue that it is contrary to *Boykin*, which does not limit its application, and therefore should be overruled. Argue also that *Hodges* is inconsistent with the current version of KRS 189A.310, which also does not limit application of *Boykin* to the immediate prior conviction.

VI. Ethical Considerations

One day, perhaps, you will represent a client in a case where the trial judge does not use the form guilty verdict sheet, and does not otherwise take steps to ensure that the defendant's plea satisfies *Boykin.* In that event, make sure that you as an officer of the court make the record clear so that future courts will know that the plea is voluntary, knowing and intelligent. Do not remain silent while hoping the judge leaves the record devoid of proof of the voluntariness of the plea. The purpose of *Boykin* is to grant relief to a defendant whose plea was actually involuntary; it's purpose is not to create a trap for an unwary or overtaxed judge in hopes of building up a defense to some possible future offense.

There is of course an argument that zealous representation of the client would require silence on the part of her counsel, since the failure of the court to make a record could inure to the benefit of the client in the future. This author rejects that argument. More significantly, the *Performance Guidelines for Criminal Defense Representation*, promulgated by the National Legal Aid and Defender Association, and adopted by the Department of Public Advocacy as the standards for representation within this Commonwealth, also rejects that argument.

Guideline 6.4 "Entry of Plea before the Court" provides that defense counsel should "make certain that the client understands the rights he or she will waive by entering the plea, and that the client's decision to waive those rights is knowing, voluntary and intelligent." When entering a plea, "counsel should make sure the full content and conditions of the

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plea agreement are placed on the record before the court."

Professionalism requires that whenever defense counsel announces a plea bargain to the court in hopes of having it accepted, he or she should take whatever steps are necessary to ensure the future integrity of that plea bargain. The judge who accepts a guilty plea, only to later find that the court has been set up for a future suppression of the conviction based on the lack of a record, will view with skepticism anything that attorney has to say in every other case that follows. This will harm all of that attorney's clients and will destroy that attorney's reputation.

That is too high a price for a chance at winning a possible future case. ■

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Our mind is capable of passing beyond the dividing line we have drawn for it. Beyond the pairs of opposites of which the world consists, other, new insights begin.

-Hermann Hesse

The 200th Anniversary of U.S. *Bill of Rights* was December 15, 1991

The 100th Anniversary of KY *Bill of Rights* was September 28, 1991

ACKNOWLEDGING THE PREVALENCE OF SEVERE MENTAL ILLNESS ON DEATH ROW

by Eric Y. Drogin and Ed Monahan

"For centuries, no jurisdiction has countenanced the execution of the insane."

— Supreme Court Justice Thurgood Marshall
Ford v. Wainwright, 477 U.S. 399 (1986).

Recent press coverage of criminal trials has included the suggestion that none of the inmates currently housed on Kentucky's "death row" has received a diagnosis of severe mental illness. *See* Kim Wessel, "Nursing-Home Slayings Go to Trial," *The Courier-Journal*, Jan. 7, 2001, at A1; and "Mental Illness Defense to be Tested," *Lexington Herald-Leader*, Jan. 8, 2001, at B3.

This assertion runs counter to the experience of mental health experts, defense counsel, and prosecutors alike. From a legal perspective, it is perhaps most effectively rebutted by reference to the recent opinion of the Sixth Circuit Court of Appeals in *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000). The Court stated:

> [W]e think that the overwhelming and undisputed evidence … was that Gall was not sane at the time he committed the acts in question. Moreover the evidence clearly showed that Gall's psychotic condition is permanent … With this overwhelming showing of Gall's severe mental illness … we can only hope the Commonwealth will note the overwhelming evidence that this man is severely mentally ill and highly dangerous and commit him indefinitely on that basis." *Id.* at 336.

The presence of severe mental illness on the part of capital clients is further corroborated by the forensic scientific literature. One study found 40% of surveyed adult "death row" inmates to be suffering from chronic psychosis. Dorothy O. Lewis et al., "Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States," 143 *Am. J. Psychiatry* 838 (1986). Further research involving the same lead author surveyed 40% of all juveniles on "death row" in the United States, concluding that 50% of these children were also subject to some form of psychosis. Dorothy O. Lewis et al., "Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States," 145 *Am. J. Psychiatry* 584 (1988).


Eric Drogin

More recently, a survey of 16 "death row" inmates in California found some degree of impairment in every case, including 14 with Posttraumatic Stress Disorder, 13 with severe Depression, and 12 with episodes of traumatic brain injury. David Freedman & David Hemenway, "Precursors of Lethal Violence: A Death Row Sample," 50 *Soc. Sci. & Med.* 1757 (2000). *See also* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) for further discussion of these conditions.

At mid-year 1998, an estimated 283,800 mentally ill offenders were housed in America's jails and prisons. 16% of inmates in local jails, 16% of inmates in state prisons jails, and 7% of inmates in federal prisons reported either (1) experiencing some form of mental illness, or (2) having been hospitalized in a mental institution prior to their current arrest and imprisonment. U.S. Department of Justice, *Mental Health Treatment of Inmates and Probationers* (1999). Such figures imply that severe mental illness is over-represented among capital as opposed to other correctional inmates.

Counsel providing post-conviction representation should remain alert to the possibility of chronic and/or recurring symptoms of severe mental illness in their clients, seeking expert consultation where appropriate. *See* Eric Y. Drogin, "Breaking Through: Communicating and Collaborating with the Mentally Ill Defendant," 22 The *Advocate* 27 (2000). ■

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The Hidden Prejudice: Mental Disability on Trial

Michael L. Perlin (2000). Washington D.C.: American Psychological Association. 327 pp.

Reviewed by Jim Clark, Ph.D., Associate Professor University of Kentucky College of Social Work

Michael Perlin is a former trial lawyer and public defense administrator from New Jersey who now teaches at the New York Law School and is adjunct professor of psychiatry at the N.Y.U. Medical School and the N.Y. College of Medicine. Over the past two decades, Professor Perlin has emerged as the most prolific and recognized legal scholar in the area of mental health law, garnering numerous awards from the legal and mental health professions. *The Hidden Prejudice* (2000) will surely win him more.

In his latest book, Perlin covers a broad range of psycholegal issues, including involuntary commitment law, the right to treatment, the right to refuse treatment, the right to sexual interaction, the Americans with Disabilities Act, competence to plead guilty or waive counsel, the insanity defense and the Federal Sentencing Guidelines. While the net is cast wide, Perlin argues that all dimensions of mental health law are shot through with thematic distortions and prejudices which undermine fair treatment under the law for mentally ill persons. He argues vigorously that understanding these prejudices is as important to legal analysis as grasping the relevant case law. Perlin identifies these controlling prejudices as *sanism* and *pretextuality.*

Sanism, like racism or sexism, is often subtle and sometimes invisible. Sanist rulings are characterized by the belief that common sense notions about mental illness should be the evidentiary standard. This heuristic or bias tends to devalue the complexities of mental illness and human behavior. Furthermore, when mentally ill defendants are poor and from minority groups, "the prejudices conflate and become grounded in eugenic and cultural pseudoscience that reflect larger, public attitudes." (p.39). Such beliefs include:

- Mentally ill persons are different and perhaps less than human.
- They are dangerous and frightening.
- They are presumptively ignorant and incompetent to make decisions or participate in society.
- Mental illness can be easily identified by lay persons and is accurately portrayed in the media.
- Ordinary common sense is all that is required to understand it.
- Mentally ill persons should be segregated, and if do-gooder, activist attorneys had not meddled, such individuals would be where they belong (in institutions) and all of us would be better off.

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Perlin claims that the above are not only public attitudes, but also beliefs held widely by judges, legislators, lawyers, jurors and even mental health experts. "Criminal trial process case law is riddled with sanist stereotypes and myths." (p. 53)

If sanism is a commonly-held prejudice shared by actors in the legal system, *pretextuality* is its behavioral manifestation specific to the criminal justice system. Perlin argues:

> By pretextuality, I mean simply that courts accept (either implicitly or explicitly)
> testimonial dishonesty and engage similarly in dishonest (frequently meretricious)
> decision making. This pretextuality infects all players, breeds cynicism and disrespect
> for the law, demeans participants, reinforces shoddy lawyering, invites blase, and, at times
> promotes perjuries and corrupt testifying. (p.60).

In brief, by employing pretextuality the legal system selectively and teleologically accepts or rejects social science evidence depending on whether the use of that data meets the system's *a priori* needs.

One example of rampant pretextuality is the routine non-consideration of mental health and developmental psychopathology evidence in the mitigation phase of capital cases.

The mitigation specialist testifies before a "death-qualified" jury who has already found the defendant guilty. Lawyers, jurors and the judges are usually exhausted and, perhaps, morally outraged, by this point in the trial. For example, I was instructed by defense counsel in one capital case during the penalty phase to get on and get off the stand quickly so the jurors would not get mad that too much mitigation evidence was being presented. I testified for ten minutes in that case even though I had substantial information to communicate about the mental health issues in this case. Perlin would see capital trial mitigation processes as shot through with sanism (a bad childhood or a mental illness is no excuse.....) and pretextuality (the defendant committed a heinous crime and doesn't deserve any kind of special break.....after all, the victims never got one).

Despite Perlin's gloomy and reality-based appraisals of the status quo, he does hold out hope that mentally ill persons might someday get fairer treatment under the law. He argues that lawyers and experts can turn to the recent legal school known as Therapeutic Jurisprudence as an analytic framework to uncover sanism and pretextuality in specific and productive ways. Therapeutic Jurisprudence proposes "that we should be sensitive to the consequences of governmental action and that we should ask whether the law's antitherapeutic consequences can be reduced and its therapeutic consequences can be enhanced without subordinating due process and justice values." (p. 273) Therapeutic Jurisprudence relies on a careful conceptual and scientific grasp of mental illnesses and the actual impact of such disorders on persons. Therapeutic Jurisprudence also requires the employment of research studies that empirically test and measure the impact of laws and legal decisions on mentally ill persons and their impact on society. Implicit in this approach, especially at the case level, is the privileging of the client's perspective about the impact of particular decisions. Therapeutic Jurisprudence also has the potential for organizing and enhancing the domain of "law and mental health" scholarship, so that such work can gain the respect it deserves and become incorporated into American jurisprudence. Perhaps then, Perlin argues, we will finally approach this area from a perspective of fairness, rationality, and coherence.

I would argue that such coherence, while in short supply in Kentucky, has been evident in recent decisions. For example, the Kentucky Supreme Court's unanimous decision in *Binion v. Commonwealth*, Ky., 891 S.W.2d 383 (1995) mandated the provision of a defense mental health expert for every [felony] trial defendant with mental illness where that mental illness is a significant factor at trial. This reversed the longstanding and pretextual holding that the same mental health expert could act effectively as friend of the court, prosecution witness and defense witness. In the recent *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000) decision, the Sixth Circuit U.S. Court of Appeals demonstrated that a careful judicial analysis of the competence and insanity proceedings in a capital case is critical to understanding the due process issues at hand. The Court's microscopic attention to these problems led to their conclusion that due process must ensure that "….an understandably outraged and angry public as well as a prosecution determined to convict" does not prevent the occurrence of a constitutionally sound trial through mere "summary treatment" of the mitigation evidence. *Id.* at 277-78. Perlin would find hope in such painstaking, judicial analyses that reject sanist approaches and pretextual practices.

The Hidden Prejudice should be on the desk of every attorney, judge and mental health expert who practices in the area of mental disability law. While many will dislike Perlin's predilection for the jeremiad, no thinking reader will fail to appreciate the enormous scholarship underpinning his passionate and unsparing judgments. The footnotes alone are worth careful study, and even this reader who has scoured the literature for over a decade found new and illuminating references. While Perlin may be investing too much hope in Therapeutic Jurisprudence, (for example, he makes no reference to the illuminating findings from the Law and Economics or Narrative schools of legal theory), he has successfully argued that mentally ill persons deserve better representation and fairer treatment under the law, and he has suggested ways of getting nearer to that constitutional ideal. Indeed, these vulnerable, sometimes troubling, but certainly, *fellow* citizens will not receive justice—much less mercy—until key actors in the criminal justice system commit to doing the intellectual and moral work necessary for fundamental reform. ■

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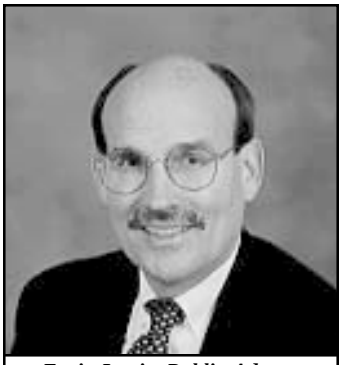
Defender Leadership Increased



Ernie Lewis, Public Advocate

Fifty-three Defender Leaders gathered at Lake Cumberland State Park February 20-23, 2001 to learn better defender leadership skills within Kentucky's and Minnesota's full-time statewide public defender programs. There were 48 Kentucky defender leaders and future leaders and 5 Minnesota defender leaders working together for the 2 1/2 days.

Public Advocate Ernie Lewis, who has been a public defender since 1977 and the Chief Defender since 1996, began the program by reflecting on where the Kentucky defender program has come since being created in 1972 by the Kentucky General Assembly at the request of Governor Wendell Ford. He described the progress in recent years, as the full-time system has spread across the Commonwealth.

Chief Minnesota Defender John Stuart, who has been a public defender since 1978 and who has led his statewide program for 11 years, gave the keynote address for DPA's Leadership Practice Institute. "There is no substitute for the deep belief in the work we do as public defenders. We are the spiritual heirs of the lawyers who worked in the civil rights movement," John said. "Besides these deep beliefs, public defender leadership requires skills, and those skills take as much work as do the development of defender litigation skills. Public Defender Leadership has skills we can learn together."

John compared the skills necessary to be a good litigator to those needed to be a good leader:

1) *Parties.* The parties are different. For litigators, the primary party is litigator *vs.* prosecutor. For leaders, it's defender leader *and* many other parties, people, groups.

2) *Relationships*. A key relationship for the litigator is with the deciders-jurors, trial judge, and appellate court judges. For the leader, key relationships are with members of the criminal justice community, the Executive Branch, community alliances, legislative leaders, the public, and the media.

3) *Tasks.* The primary task for the litigator is successful resolution of the litigation by demonstrating the inappropriateness of the conviction or penalty by showing the lack of evidence for an element of the offense or a prejudicial error. The leader's primary task to create a better reality for defender clients by bringing elements together.

4) *Preparation.* Litigators prepare using *traditional* advocacy skills while leaders bring about *new opportunities* for effective advocacy.

5) *Time.* Most litigators have an end point for their representation of their client or the client is acquitted, the case is passed on to a different lawyer for the appeal and post-conviction. On the other hand, most of what leaders do extends over longer periods and in some instances the work on an issue never ends for the leader.

John Stuart

John Stuart invited us to see what we could bring from the litigation skills we have over into our leadership skills. His list of skills that we can transfer to the leadership work included:

- ❑ issue identification,
- ❑ issue framing,
- ❑ preparation,
- ❑ fortitude,
- ❑ investigation,
- ❑ creativity,
- ❑ persuasive communication of a compelling theory,
- ❑ presentation of witnesses to advance the theory,
- ❑ persuasive writing,
- ❑ negotiation,
- ❑ consultation with others.

New tools for litigators to develop as they increase the effectiveness of their leadership included:

- ❑ working with community groups,
- ❑ criminal justice committees,
- ❑ speaking,
- ❑ teaching,
- ❑ coaching employees,
- ❑ creating coalitions,
- ❑ starting partnerships.

John Stuart told us about a 12-year effort in Minnesota that he was involved with to bring about better representation of juveniles. Through that effort which had significant failures but which eventually succeeded, John learned:

- We can obtain support for what we believe in;
- We have to listen to others who see things differently

than us;
- We must adjust our thinking about how long it will take to succeed, and
- We need relationships with others who think like us and who think differently than us.

"A quality public defender program has a deep commitment to clients that is clearly expressed with consistency, " John said. "Kentucky's public defender program is known," according to John, "for it's quality training and it's client centeredness."

Public Advocate Ernie Lewis invited the defender leaders to practice their leadership in a principled way. He invoked Robert Kennedy's quote in calling defenders to be charge agents, "Some people see things as they are and ask why. Others see things as they would be and ask why not?"

"I believe in leadership, " Lewis proclaimed. "Defender leadership is what will provide the needed improvement in representation of clients across Kentucky." Lewis focused on the four roles of leaders:

1. *Visonary.* The Leader is a visionary, creating a shared, not democratic and not dictated, vision to advance the agency's mission, in a positive, compelling way. Effective Leaders present the vision with hope, no matter what. Leaders rejuvenate others. They have high clarity on the agency's core values, which include integrity and client- centered representation. They lead according to those values, not according to personal ambition.

2. *Change Agent.* The Leader is a change agent and problem solver. Leaders are not problem creators. Leaders help employees to get past resistance and work avoidance, scape-goating, externalizing the enemy, denying the problem, blaming. Leaders constantly ask, *how can we improve?* Managers keep the status quo. Leaders seek change for the better, paying attention to the problems. Confronting the problems and solving the problems is the work of the leader.

3. *Accessing Perspectives.* The leader analyzes and solves problems from different perspectives. Lewis suggested the benefit of using the four frames: structural, human resource, political, and symbolic of Bolmon and Deal's *Reframing Organizations* (1997 2d ed.). As Mark H. Moore in *Creating Public Value* (1995) cautions us, "Tragedy can strike managers who do not pay daily attention to the management of their political authorization." Moore tells us that the public wants public management of their resources to be accountable. "By resisting accountability, managers loose some of their ability to challenge the organizations they lead…. They become vulnerable to their own subordinates' desires to be protected from demands for change." Lewis said that as the Chief State Defender he has come to greater awareness of the fact that effective defenders are co-leaders of the criminal justice system.

4. *Coach.* The leader is a coach. Coaching improved performances is a primary way leaders add value to the agency's bottom line — quality representation of clients.

Lewis concluded by asking for leadership with integrity and humility, "We lead for other purposes. It's not about us. Effective leaders are humble. As Psalm 91 instructs, we are like grass; though in the morning it shoots up, by evening it droops and withers…so make us know how few are our days, that our minds may learn wisdom."

The two and a half days of work focused on improving coaching, communication, and problem solving skills. We also studied the need as leaders to analyze how we must change and how we must understand that success requires support from our authorizing environment, sufficient operational capacity, and an increase in the value of what we do for the public.

Participants appreciated the help this Leadership Practice Institute provided them on the day-to-day skills of leading well in their office. One participant said, "I wish I had this help five years ago when I became directing attorney of my trial office." ■

The mind has exactly the same power as the hands; not merely to grasp the world, but to change it.

-Colin Wilson

Better keep yourself clean and bright; you are the window through which you must see the world.

-George Bernard Shaw

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Gill Pilati

PRACTICE CORNER

LITIGATION TIPS & COMMENTS COLLECTED BY MISTY DUGGER

Misty Dugger

Attorneys Should Preserve Pre-Trial Discovery Record for Use During Trial and Appeal

Attorneys should place a written copy of the informal discovery agreement in the record just as a formal order would be filed. The attorney can then file an inventory of discovery received prior to trial. The benefits of this approach are two-fold. (1) If the Commonwealth has not turned over an item of discovery, the attorney can file a written objection before trial to prevent the Commonwealth from presenting any evidence not turned over pursuant to the discovery agreement or order. The attorney can also object to the introduction of any such evidence during the trial. (2) Second, this properly preserves the issue for appeal since preservation requires both an objection and a ruling. Using this method will insure that the record will contain the written motion and the oral objections, followed by a ruling from the trial judge.

~ Rebecca DiLoreto
Post Trials Division Director, Frankfort

Argue to Prohibit Gun Enhancement Evidence During the Guilt Phase of a Drug Offense Trial

When the grand jury indicts on any drug charge with a gun enhancement under KRS 218A.992, the trial attorney should argue to prohibit any evidence or mention of the gun during the guilt phase of the underlying drug charge. The gun enhancement provision of KRS 218A.992 is not an element of 218A.1432. More importantly, KRS 218A.992 indicates that the legislature intended the gun enhancement evidence to be presented in a phase of the trial separate from the guilt phase. (*e.g.* a trifurcated procedure like in DUI cases; see *Dedic v. Commonwealth*, Ky., 920 S.W.2d 878 (1996)).

In relevant part, KRS 218A.992 states "...any person **convicted** of any violation of this chapter who was at the time of the commission of the offense in the possession of a firearm...". Thus the jury should be required to resolve the underlying charge before the gun enhancement can apply. This is borne out in *Adams v. Commonwealth*, Ky. App., 931 S.W.2d 465, 468 (1996), when the Court of Appeals stated:

> KRS 218A.992 provides an enhanced penalty for those violating Chapter 218A while in possession of a firearm. The severity of the penalty increases due to the dangerous status of the violator as an armed perpetrator. The possession of a firearm, however, is not an element necessary to determine guilt of the substantive offense. Consequently, KRS 218A.992 is nothing more than a sentencing statute reflecting the dangerous nature of a crime perpetrated by an armed criminal. In this respect, the statute is somewhat analogous to both KRS 189A.010 and KRS 532.080, the DUI and PFO statutes.

Similarly, in *Peyton v. Commonwealth*, Ky., 931 S.W.2d 451 (1996), the Supreme Court approved a trifurcated procedure in a drug case involving subsequent offenses and a PFO.

Note that the grand jury must indict on the gun enhancement provision of KRS 218A.992, just like a PFO enhancement under KRS 532.080. If the grand jury failed to indict on the gun enhancement charge, the trial attorney should argue that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, 2000 LEXIS 4304 (2000), requires the enhancement to be presented to the jury. The jury must then determine its existence and nexus beyond a reasonable doubt. Without an indictment, *Apprendi* presents a major obstacle for the Commonwealth to seek enhanced punishment under the gun enhancement provisions.

~ Richard Hoffman, Appellate Branch, Frankfort
~ Tom Griffiths, Directing Attorney, Maysville

Simultaneous or Continuing Objection is Necessary to Preserve Error

To properly preserve the objection for appellate review, attorneys must renew their objections prior to the actual testimony or introduction of the evidence at issue. This is true even if the attorney objected to the evidence prior to trial. The appellate courts are more strictly interpreting KRE 103 and RCr 9.22. Failure to object, when the evidence is offered, may be viewed by the appellate courts as a waiver of the alleged error or a change in trial strategy by the defense. At a minimum, the attorney should ask for a continuing objection for the record when he or she makes the initial objection to the evidence or testimony.

~ Misty Dugger, Appellate Branch, Frankfort

Practice Corner needs your tips, too.

If you have a practice tip, courtroom observation, or comment to share with other public defenders, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Mdugger@mail.pa.state.ky.us. ■

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